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A TREATISE  
ON  
THE LAW AND PRACTICE  
OF  
Foreclosing Mortgages

ON REAL PROPERTY,  
AND OF  
REMEDIES COLLATERAL THERETO,  
WITH FORMS,

BY  
CHARLES HASTINGS WILTSIE  
OF THE ROCHESTER BAR.

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WITH  
A SUPPLEMENT

BRINGING THE WORK DOWN TO MARCH, 1897, AND ADDITIONAL  
CHAPTERS ON

Mortgage Redemptions

BY  
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OF THE NEW YORK BAR,

Author of "Kerr on Real Property;" "Kerr on Business Corporations;" "Kerr  
on Homicide," etc., etc.

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IN TWO VOLUMES,  
VOL. II.

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TO  
JOHN DREW SNEDEKER  
OF THE BROOKLYN BAR,  
This Volume is Respectfully Dedicated  
BY THE AUTHOR.



## PREFACE.

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Since the Enlarged Edition of this work was completed, in the early spring of 1889, so great has been the volume of decisions in the various courts of last resort of this country, in which are considered the numerous questions arising in the foreclosure of mortgages; the disposition of the proceeds and surplus arising under mortgage sales; deficiency, and judgment therefor; redemption from mortgage liens and mortgage sales, and the like,—as to lend a color of truth to the ancient distich of that early copyist whose ardor of transcription (*jucundi acti labores*) left a whole library of manuscript, on which he inscribed the motto :

“Plura voluminibus jungenda volumina nostris,”

“Nec mihi scribendi terminus ullus erit.”<sup>1</sup>

In the present work all the decisions rendered since the publication of the Enlarged Edition are carefully gathered, analyzed and classified in such a manner as to be most assistful to those using the work. The author has sought to make this work an omnium-gatherum in the true sense and not in the colloquial meaning of that term,—has included everything, but in a systematic and orderly manner. The volume is practically a new treatise on the same general plan and arrangement adopted in the Enlarged Edition, so that the new matter is uniform with the original work, and the two volumes form a consecutive and harmonious treatise, giving all there is on the subject. Decisions in the line of those discussed in the Enlarged Edition are gathered under the same sectional numbers as those used in that work. But many new questions are dis-

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<sup>1</sup> Which may be liberally translated :

More volumes with our volumes still shall blend,  
And to our writing there shall be no end.



cussed in the cases of the last decade. This new matter has been incorporated in the proper place, in separate sections, with the letters of the alphabet following the Arabic numerals, as 19a, 19b, 19c, etc. The wealth of new matter, as well as the value of these additions, will be recognized on glancing over the Table of Contents.

Not only have new questions arisen and been discussed since the publication of the Enlarged Edition—such as the right of mortgagees of riparian lands to the strip of land bordering upon the water, reclaimed by filling-in;<sup>1</sup> but some questions upon which the authorities were at that time conflicting, have been settled,—such as the question whether the heirs and devisees of parties originally liable for the mortgage debt are necessary parties;<sup>2</sup> and some heretofore established principles have been overturned,—such as the doctrine as to the responsibility for the loss in case of embezzlement by a receiver appointed of rents and profits pending foreclosure. The old doctrine, as set forth in the text books and reports, is that the loss should fall on the mortgagor; the new rule<sup>3</sup> is that where the mortgagee secures his own agent to be appointed, and that agent embezzles the funds, the loss falls on the mortgagee. The question of whether money necessarily expended to redeem the mortgaged property from a tax-sale becomes a part of the mortgage debt, to be repaid on redemption, or whether the transaction is a new purchase of a lien upon the estate and is independent of the mortgage, is discussed, the authorities carefully analyzed and found to sustain the position that money thus paid out is to be repaid on redemption.<sup>4</sup>

Ten new chapters have been added to the Supplement, in which the various questions relating to redemption from mortgage liens and mortgage foreclosures, are fully discussed. The author ventures to hope that this new feature

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<sup>1</sup> This matter is fully discussed and all the authorities cited in §§ 256p & 277t.

<sup>2</sup> The present rule is fully discussed in § 215.

<sup>3</sup> Set forth in § 656a.

<sup>4</sup> See § 1044.

of the Supplement may be found to be, in and of itself, sufficient excuse for the existence of the volume. This is the first attempt at an orderly, systematic and exhaustive treatment of the subject. That it is free from errors of omission or commission is more than is rationally to be expected; but no pains have been spared to secure completeness and accuracy in every detail, and it is thought that the errors, both of omission and commission, are reduced to the minimum.

A complete Table of Cases, both of the Enlarged Edition and the Supplement, has been added to the Supplement, and will be found between the text matter and the Index. A new and exhaustive analectic Index has been added, covering both volumes, thus facilitating their use by bringing all the questions discussed in those volumes under one head in the Index. The matter in the foot-notes has been indexed, as well as the matter in the text, and the fact that the point indexed is in the foot-note matter is indicated by adding the letter "n" to the page number.

The author desires to acknowledge his great indebtedness to Stephen C. Betts, Librarian of the Law Library in Brooklyn, for uniform kindness and favors extended by himself and his gentlemanly assistants, which materially facilitated the preparation of this work.

JAMES M. KERR.

February 15, 1897.

## ERRATA.

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1047. Ninth line from top, fourth word in line should be prevent instead of "permit."
1110. Fifth line from top, last word in line should be properly instead of "personally."
1483. § 883a should be § 883.
1527. Fifth word in head-line should be condition instead of "contract."
1542. § 983, second word should be lienor instead of "purchaser."



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# MORTGAGE FORECLOSURES.

## SUPPLEMENT.

### CHAPTER I.

#### NATURE AND OBJECT OF FORECLOSURE.

§ 1. Definition.

1a. Same—Execution in *scire facias*—Delaware doctrine.

3a. Methods of foreclosure—In Delaware.

3b. Same—In Montana.

4. Foreclosure by entry and possession.

4a. Same—Authority of attorney to make entry.

5. Strict foreclosure.

5a. Same—Stipulation delaying—Alabama rule.

5b. Same—Where mortgage covers two parcels of land.

6. Statutory foreclosures.

§ 7. Action in equity,

7a. Same—Nature of proceedings.

7b. Same—Jurisdiction.

10. Concurrent remedies.

10a. Same—Under state statutes.

10b. Same—Action for debt.

11. Result of foreclosures.

11a. Same—Lien of decree—Illinois rule.

12. Effect on title of foreclosure and sale.

13. Who barred by foreclosure.

14. Subsequent incumbrances.

15. Foreclosure as a payment of the debt.

15a. Same—Connecticut doctrine.

§ 1. Definition.—It is said by Justice Holmes, speaking for the supreme judicial court of Massachusetts, in the case of *Shepard v. Richardson*,<sup>1</sup> that, properly speaking, the right to foreclose means the right to cut off a right to redeem given by equity, when, by the condition of the mortgage, the mortgagee's estate has become absolute at law.<sup>2</sup>

§ 1a. Same—Execution in *scire facias*—Delaware doctrine.—The Delaware chancery court say that the

<sup>1</sup> 145 Mass. 32 (1887); s. c. 11 N. E. Rep. 733; 4 N. Eng. Rep. 305.

<sup>2</sup> See: *Koch v. Briggs*, 14 Cal. 256, 262 (1859); s. c. 73 Am. Dec. 651; *Sampson v. Pattison*, 1 Hare 533, 536 (1842). (1)

power of sale by execution upon judgment recovered in *scire facias* upon a mortgage is in no proper sense a foreclosure of the mortgage, and does not furnish a full and complete remedy to the mortgagee.<sup>1</sup>

§ 3a. Methods of foreclosure—In Delaware.—It is said, in the case of *Fox v. Wharton*,<sup>2</sup> that in Delaware the only remedies by which a mortgagee may enforce the mortgage are by judgment upon *scire facias* in the superior court, and by a bill in the court of chancery for a foreclosure.

§ 3b. Same—In Montana.—Under the Montana statute declaring that the mortgagee shall not “recover possession without foreclosure and sale,” a provision in a mortgage, giving the mortgagee or trustee authority to enter upon the possession of the premises, is invalid.<sup>3</sup> And the provision of the Montana statute<sup>4</sup> that “a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable an owner of the mortgage to recover possession of the real property without foreclosure and sale,” does not prevent giving to the mortgagee a power to sell the premises upon default.<sup>5</sup>

§ 4. Foreclosure by entry and possession.—A mortgage is not effectually foreclosed under the Maine statute<sup>6</sup> by peaceably and openly taking possession in the presence of two witnesses, if the witnesses fail to state in their certificates the time of entry.<sup>7</sup> Under the Kansas statute where one article of a mortgage provides for entry, which is not to be made until six months after default and demand of payment, and another article provides for a sale, equally limited, followed by a paragraph saying: “This provision

<sup>1</sup> *Fox v. Wharton*, 5 Del. Ch. 200 (1878).

<sup>2</sup> 5 Del. Ch. 200 (1878).

<sup>3</sup> *First Nat. Bank of Butte v. Bell Silver & Copper Mining Co.*, 8 Mont. 32 (1888); s. c. 19 Pac. Rep. 403. See: *Post*, § 710.

<sup>4</sup> Mont. Comp. Stat., § 371, p. 1611.

<sup>5</sup> *First Nat. Bank of Butte v. Bell Silver & Copper Mining Co.*, 8 Mont. 32 (1888); s. c. 19 Pac. Rep. 403.

<sup>6</sup> Me. Rev. Stat. c. 90, § 3.

<sup>7</sup> *Snow v. Pressey*, 82 Me. 552 (1890); s. c. 20 Atl. Rep. 78.

is cumulative to the ordinary remedies by foreclosure in the courts \* \* \* \* upon default being made as aforesaid," a delay of six months after default is not necessary before instituting a suit for foreclosure.<sup>1</sup>

§ 4a. *Same—Authority of attorney to make entry.*—The supreme judicial court of Massachusetts say<sup>2</sup> that after a lapse of forty years, the authority of an attorney to make an entry to foreclose a mortgage may be inferred from his assumption to act for the holder of the mortgage, together with the facts that the mortgage was in his possession, that the lands were afterwards taxed to the person for whom he assumed to act, and that there is a fair inference that such person afterwards claimed to be owner.

§ 5. *Strict foreclosure.*—In Missouri a mortgagee, after forfeiture, may recover possession by ejectment without foreclosure.<sup>3</sup>

IN MONTANA where the mortgagor, after the maturity of the mortgage, gives the mortgagee permission to enter, the mortgagee may rightfully retain possession until the debt is paid.<sup>4</sup>

IN NEW HAMPSHIRE the mortgagee's constructive possession, during the year following his foreclosing entry, is not actual, within the meaning of the statute of foreclosure, as against the mortgagor's second grantee, who has actual and exclusive possession, not subordinate in fact to any right of any other person, during the whole of the same year.<sup>5</sup>

<sup>1</sup> *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 56 Fed. Rep. 221 (1888); s. c. 4 Ry. Corp. L. J. 362; 1 L. R. A. 397.

<sup>2</sup> *Barnes v. Boardman*, 149 Mass. 105 (1889); s. c. 21 N. E. Rep. 308; 3 L. R. A. 785.

<sup>3</sup> *Lewis v. Schwem*, 93 Mo. 26 (1887); s. c. 2 S. W. Rep. 391; 6 West. Rep. 855. After citing *Bush v. White*, 85 Mo. 339 (1884); *Buren v. Buren*, 79 Mo. 538 (1883); *Rogers v.*

*Brown*, 61 Mo. 187 (1875); and *Hunter v. Hunter*, 50 Mo. 445 (1872), the court say: From these decisions there can be no doubt but the statute does apply to mortgages." See: Post, § 836a.

<sup>4</sup> *Fee v. Swingly*, 6 Mont. 596 (1887); s. c. 13 Pac. Rep. 375.

<sup>5</sup> *Bartlett v. Sanborn*, 64 N. H. 70 (1886); s. c. 6 Atl. Rep. 486; 3 N. Eng. Rep. 168.

IN NEW JERSEY it is held, in the case of *Leeds v. Gifford*,<sup>1</sup> that a mortgagee may take possession of the premises to obtain payment of his debt; and a payment so obtained is subject, in respect to its appropriation, to the legal rules which govern the appropriation of other payments.

§ 5a. **Same—Stipulation delaying—Alabama rule.**—It is said by the Supreme Court of Alabama, in the case of *Grandin v. Hart*,<sup>2</sup> that the mortgage having been given to secure the payment of a note which the mortgagor had assigned to the mortgagee, and containing a stipulation that the latter should not “institute any proceeding to foreclose,” until the maker and indorser had been sued to insolvency, the right to take possession is postponed until the happening of this contingency; and the mortgagee cannot maintain ejectment before that time.

§ 5b. **Same—Where mortgage covers two parcels of land.**—In those cases where the mortgage covers two distinct parcels of real estate, the mortgagee, after condition is broken, may maintain a real action to recover possession of but one parcel. If a conditional judgment is rendered in such an action, it must be for the full amount due on the mortgage debt.<sup>3</sup>

§ 6. **Statutory foreclosure.**—In Missouri an action under the statute to foreclose a mortgage or deed of trust is held to be a legal action;<sup>4</sup> but the statutory mode of foreclosure is not exclusive.<sup>5</sup> In the case of *Riley v. McCord*,<sup>6</sup> the Court say: “It has long been the opinion that, not-

<sup>1</sup> 41 N. J. Eq. 49 (1886); s. c. 5 Atl. Rep. 759; 4 Cent. Rep. 148.

<sup>2</sup> 80 Ala. 116 (1885).

<sup>3</sup> *Phillips v. Crippen* (Me. 1886), 5 Atl. Rep. 69; s. c. 2 N. Eng. Rep. 428.

<sup>4</sup> *Ruby v. Missouri Coal & Mining Co.*, 21 Mo. App. 159 (1886); s. c. 7 West. Rep. 758, 761, citing *Mason v. Barnard*, 36 Mo. 284 (1865).

<sup>5</sup> *Rubey v. Missouri Coal & Mining Co.*, 21 Mo. App. 159 (1886); s. c. 7

West. Rep. 758. A different rule prevails in California (*Barbieri v. Ramelli*, 84 Cal. 154 (1890); s. c. 23 Pac. Rep. 1086); Montana (*First Nat. Bank of Butte v. Bell Silver & Copper Mining Co.*, 8 Mont. 32 (1888); s. c. 19 Pac. Rep. 403); Oregon (*Thompson v. Marshall*, 21 Oreg. 171 (1891); s. c. 27 Pac. Rep. 957), and perhaps elsewhere. See: Post, § 7.

<sup>6</sup> 24 Mo. 268 (1857).

withstanding the mode prescribed by the statute, a party may forego the statutory remedy, and pursue his rights in a court of chancery by a bill in equity." Consequently it has been said that "when a proceeding to foreclose a mortgage has been had, in order to determine whether it was under the statute or according to the course in chancery, we must have recourse to the substance of the thing, and not to the rhetorical flourishes with which it may be accompanied."<sup>1</sup>

§ 7. *Action in Equity.*—In some states it is held that an action under the statute to foreclose a mortgage or deed of trust, is a legal action<sup>2</sup>, but in others not. It is thought that in all states a person who has taken an absolute deed as security for a loan must file a bill in order to cut off the debtor's right to redeem, and is obliged to accept the amount due and re-convey the property, when such amount is properly tendered at any time before the right to redeem is cut off.<sup>3</sup> It is held in New York that the parties to a mortgage may, by an agreement, provide the method for the enforcement of their rights, where the property mortgaged is situate out of the state and beyond the jurisdiction of its courts, unless contrary to some statutory requirement.<sup>4</sup> But under the Oregon code,<sup>5</sup> which provides that all liens, other than those of judgments, shall be foreclosed by suit, a provision in a mortgage, or other instrument creating a lien on land, stipulating for foreclosure in any other manner, is void.<sup>6</sup> The terms of a statute requir-

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<sup>1</sup> *Riley v. McCord*, 24 Mo. 268 (1857).

<sup>2</sup> See: *Rubey v. Missouri Coal & Mining Co.*, 21 Mo. App. 159 (1886); s. c. 7 West Rep. 758.

<sup>3</sup> *McSorley v. Hughes*, 58 Hun (N. Y.) 360 (1890); s. c. N. Y. Supp. 179; 34 N. Y. S. R. 945.

<sup>4</sup> *Farmers' L. & T. Co. v. Bankers & M. Teleg. Co.*, 44 Hun (N. Y.) 400, 406 (1887).

<sup>5</sup> *Hill's Oreg. Code*, § 414.

<sup>6</sup> *Thompson v. Marshall*, 21 Oreg. 171 (1891); s. c. 27 Pac. Rep. 957.

In California the same rule, it is thought, prevails. See: *Barbieri v. Ramelli*, 84 Cal. 154 (1890); s. c. 23 Pac. Rep. 1086.

In Montana, also, See: *First National Bank of Butte v. Bell Silver & Copper Mining Co.*, 8 Mont. 32 (1888); s. c. 19 Pac. Rep. 403.

In Missouri, however, an action under the statute to foreclose a mort-

ing, in case of a bond and mortgage given for the same debt, that the mortgage shall be first foreclosed,<sup>1</sup> are not waived by giving with the bond a warrant to confess judgment; and a judgment entered upon such bond before the foreclosure of the accompanying mortgage is irregular.<sup>2</sup> And it is held that a statute providing that a mortgage shall be foreclosed before the bond, applies whether the mortgagee be complainant or defendant.<sup>3</sup>

In an action merely to foreclose a mortgage and asking for a judgment for a deficiency, being in equity, the mortgagee is not entitled, upon defeat, because of the invalidity of the mortgage, to direct a judgment on the bond, but will be left to his remedy at law<sup>4</sup>.

§ 7a. Same—Nature of proceedings. — Foreclosure proceedings in equity are of the nature of proceedings *in rem*; are not ordinarily intended to act *in personam*;<sup>5</sup> and it is held that as regards a purchaser from the mortgagor, an action for foreclosure of a mortgage is not to be regarded as a mere action for possession, as in ejectment, so as to make the rule that the plaintiff may obtain an order for delivery of possession applicable to a case in which the mortgage sought to be foreclosed is void because of illegal or immoral consideration.<sup>6</sup>

§ 7b. Same—Jurisdiction.—All matters pertaining to foreclosure of mortgage, to the protection and preservation of mortgaged property, and to relief against fraud, are of equitable jurisdiction,<sup>7</sup> and a resort to proceedings in

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gage or deed of trust is not exclusive. *Rubey v. Missouri Coal & Mining Co.*, 21 Mo. App. 159 (1886); s. c. 7 West. Rep. 758; See: *Ante* § 6.

<sup>1</sup> As N. J. Supp. Rev. Stat. 490; P. L. 1881, p. 184.

<sup>2</sup> *Hellyer v. Baldwin*, 53 N. J. L. (24 Vr.) 141 (1890); s. c. 20 Atl. Rep. 1080.

<sup>3</sup> *Hinkle v. Champion*, 42 N. J. Eq. (15 Stew.) 610 (1887); s. c. 8 Atl. Rep. 656; 6 Cent. Rep. 840.

<sup>4</sup> *Dudley v. Congregation of Third Order of St. Francis, N. Y.*, 19 N. Y. Supp. 605 (1892); s. c. 47 N. Y. S. R. 60; See: *Post*, § 10a.

<sup>5</sup> *Burges v. Souther*, 15 R. I. 202 (1884); s. c. 2 Atl. Rep. 441; 1 N. Eng. Rep. 819.

<sup>6</sup> *Clark v. Hagar*, 22 Can. S. C. 510 (1894).

<sup>7</sup> *McCormick v. Hartley*, 157 Ind. 248 (1886); s. c. 6 N. E. Rep. 357; 3 West Rep. 667.



equity for the purpose of foreclosing a mortgage is necessary when the property is inadequate to pay the debt, the mortgagor is insolvent, and the mortgagee is not given the right to purchase at a sale under the power.<sup>1</sup> In such cases the Court has power, for the best interests of all parties concerned, to decree a sale of mortgaged premises for the payment of the mortgage debt, upon the prayer or assent of mortgagee in his answer or cross-bill, although the relief prayed for in the petition is for the appointment of a receiver to manage the property and apply the proceeds on the debt.<sup>2</sup>

§ 10. **Concurrent remedies.**—A mortgagee after default has three remedies, any one or two or all of which he may pursue concurrently. These remedies are (1) an action at law to recover the debts (2), an appropriate action to recover the mortgaged property, and (3) a foreclosure of the mortgage; but when he pursues these remedies concurrently, each must be governed by the rules of law applicable to the forum in which it is brought.<sup>3</sup> The general rule, however, is that the holder of a note or bond secured by mortgage cannot, while prosecuting an action in equity for foreclosure, in which he asks that execution may be awarded to him for any balance left unpaid by the proceeds of sale of the mortgaged land, maintain an action at law on the note or bond,<sup>4</sup> and where there is an action pending at law on the note or bond, the

<sup>1</sup> *American Freehold Land Mortgage Co. v. McCall*, 96 Ala. 900 (1882); 11 S. C. 11 So. Rep. 288.

<sup>2</sup> *Brown v. Chesapeake & Ohio Canal Co.*, 73 Md. 567 (1891).

<sup>3</sup> *Tyson v. Weber*, 81 Ala. 470 (1887); S. C. 2 So. Rep., 901.

<sup>4</sup> *Van Vrankin v. Roberts* (Del. 1893), 29 Atl. Rep. 1044; *Anderson v. Pilgram*, 30; S. C. 499 (1889); S. C. 9 S. E. Rep. 587; 4 L. R. A. 205. See: *Nichols v. Smith*, 42 Barb. (N. Y.) 381 (1864); *Marx v. Davis*, 56 Miss. 745 (1879); See: *Hargreaves v. Menken* (Neb. 1895),

63 N. W. Rep. 951; *Moore v. Anglo-American Dry Dock Co.*, 81 Hun (N. Y.) 389 (1894); S. C. 31 N. Y. Supp. 110; 63 N. Y. S. R. 380; *Tobin v. Smith*, Ohio Dec. 1 Ohio N. P. 75.

A judgment recovered in a State court against a railroad company before commencement of a foreclosure suit, by a creditor who was not made a party on foreclosure, is unaffected by the decree and sale. *Stewart v. Wheeling & L. E. R. Co.*, 53 Ohio St 151 (1895); S. C. 41 N. E. Rep. 247; 34 Ohio L. J. 56; 2 Ohio Leg. N. 659; 29 L. R. A. 433.



bringing of an action in equity to foreclose the mortgage will stay all proceedings in the former suit, except in those cases where the special permission of the court to proceed with the action at law is obtained.<sup>1</sup> The reason of this is because the commencement by the mortgagee of an action in equity to foreclose his mortgage is a constructive abandonment of his other proceedings.<sup>2</sup> But the right of the holder of a bond secured by a trust deed to sue at law upon the bond is not cut off by a provision of the deed making the remedy by sale therein provided exclusive, where the bond recites only that the deed provides for the rights in the trustee to exercise the power of entry thereby conferred, to declare the principal due, to sue in case of non-payment, "subject to the qualifications therein contained, to which trust deed reference is hereby made."<sup>3</sup>

It has been said that a mortgagee of partnership lands to secure a partnership note, who after dissolution of the firm gives the continuing partner—who assumes the firm's liabilities—a discharge of the mortgage without receiving

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<sup>1</sup> Cushman v. Leland, 93 N. Y. 652 (1883); See: Schaaf v. O'Brien, 8 Daly (N. Y.) 181, 183 (1878); Gillette v. Smith, 18 Hun (N. Y.) 1012 (1879).

As cases may arise in which a resort to an action at law is necessary to fully protect the parties, power is conferred upon the Court to permit such a proceeding. Equitable L. Ins. Society v. Stearns, 63 N. Y. 341, 345 (1875); Collins' Petition, 6 Abb. (N. Y.) N. C. 227, 232 (1879); Ogden v. Padle, 2 Duer (N. Y.) 611 (1853); Engle v. Underhill, 3 Edw. Ch. (N. Y.) 249 (1838); Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841.)

The reason why a mortgagee is allowed to sue at law on the bond, and at the same time prosecute his action for foreclosure in a court of equity, is because one is a proceeding *in rem*

and the other *in personam*. Chancellor Kent in Jones v. Coude, 6 John. Ch. (N. Y.) 77 (1822).

Judgment for deficiency in an action to foreclose a mortgage was refused by Chancellor Kent in the case of Dunkley v. Van Buren, 3 John. Ch. (N. Y.) 330 (1818), upon the ground that "such a suit is not intended to act *in personam*," but that the mortgagee in such an action "is confined in his remedy to the pledge." See: Anderson v. Pilgram, 30 s. c. 499 (1888); s. c. 9 S. E. Rep. 587; 4 L. R. A. 205.

<sup>2</sup> Van Vrankin v. Roberts (Del. 1893), 29 Atl. Rep. 1044.

<sup>3</sup> Rothschild v. Rio Grande W. R. Co., 84 Hun (N. Y.) 103 (1895); s. c. 32 N. Y. Supp. 37; 65 N. Y. S. R. 193.

payment of the debt, cannot maintain an action against the retiring partner upon the note, as he must be prepared upon payment to convey to the latter the mortgaged lands.<sup>1</sup> This is upon the well known rules of law that the release of a co-obligor will release the entire debt, and an action cannot thereafterwards be maintained, either in law or in equity, against the remaining debtor or debtors.<sup>2</sup>

<sup>1</sup> Allison v. McDonald, 23 Can. S. C. 635 (1894).

<sup>2</sup> See: Armstrong v. Haywood, 6 Cal. 183 (1856); Drinkwater v. Jordan, 46 Me. 432 (1859); Cowley v. Patch, 120 Mass. 137, 138 (1876); Henderson v. Staniford, 105 Mass. 504, 507 (1870); Kingsley v. Davis, 104 Mass. 178, 179 (1870); Trustees of Catskill Bank v. Hooper, 71 Mass. (5 Gray) 574, 585 (1856); Pond v. Williams, 67 Mass. (1 Gray) 630, 636 (1854); Shaw v. Pratt, 39 Mass. (22 Pick.) 305 (1839); Gibbs v. Bryant, 18 Mass. (1 Pick.) 118 (1822); Ward v. Johnson, 13 Mass. 148 (1816); McAllister v. Dennin, 27 Mo. 40 (1858); Mason v. Eldred, 73 U. S. (6 Wall) 231 (1867); bk. 18 L. ed. 783. Also 8 Cent. L. J. 330.

In Henderson v. Staniford, *supra*, the supreme judicial court of Massachusetts say: "But in the present case, the judgment in California being against the defendant alone, if he sets it up in bar of this suit he affirms the validity of the judgment against himself and it is *eo instanti* estopped to impeach it thereafterwards." See: Hooker v. Hubbard, 97 Mass. 175 (1867).

**An agreement, not under seal, does not release.** The supreme judicial court of Massachusetts in the case of Pond v. Williams, 67 Mass. (1 Gray) 630, 636 (1854), say that an agreement, not under seal, to discharge a particular party, or an agreement not

to sue, or the like, will not have the effect to discharge joint contractors, because it does not extinguish the debt. See: Shaw v. Pratt, 39 Mass. (22 Pick.) 305 (1839).

In the case of an indorser of a promissory note, a judgment against the maker does not merge or extinguish the note as to the indorser. For some purposes such judgment is a merger of the original debt; in any suit or proceedings against the maker, such would be the effect; but it does not affect the liability of the indorser, and a suit may be maintained against him on the note. Byer v. Franklin Coal Company, 106 Mass. 131, 136 (1870), citing Ward v. Johnson, 13 Mass. 148 (1816); Porter v. Ingraham, 10 Mass. 88 (1813); Gilmore v. Carr, 2 Mass. 171 (1806).

**Where one joint contractor is sued alone, and does not plead in abatement the non-joinder of the other, and judgment is rendered against the one sued, this prevents a recovery against the other joint contractor.** Cowley v. Patch, 120 Mass. 137, 138 (1876). See: Ward v. Johnson, 13 Mass. 148 (1816); Mason v. Eldred, 73 U. S. (6 Wall.) 231 (1867); bk. 18 L. ed. 783; King v. Hoare, 13 Mees. & W. 494 (1844). Also 8 Cent. L. J. 330. Hence if, in such an action, the judgment is for the defendant upon the ground that there is no joint liability, it is a bar to a subsequent action against the other contractor upon the

§ 10a. **Same—Under state statutes.**—Under the statutes of some states, however,<sup>1</sup> foreclosure by suit is the only method by which a mortgage debt can be collected;<sup>2</sup> and where there is such a statutory provision, a stipulation in the mortgage, or other instrument creating the lien, for a foreclosure in any other manner, is void.<sup>3</sup> Such a provision being imperative, it is held, in some states, that the mortgagee cannot waive the security without foreclosure because it is worthless, and bring an action on the indebtedness.<sup>4</sup>

§ 10b. **Same—Action for debt.**—An action to recover the amount due on the interest coupons of bonds secured by a mortgage providing that upon failure to pay the interest coupons for a designated period after they become due, the principal shall become due, cannot be brought until after foreclosure and sale of the mortgaged premises, under the New Jersey act of March 23, 1881, which provides that in all cases where a bond and mortgage have been given for the same debt, all proceedings to collect the debt shall be first to foreclose the mortgage, and that suit may be brought on the bond for any deficiency.<sup>5</sup> But in Pennsylvania a recovery may be had on corporate bonds, even though they are secured by a mortgage; and the production of the mortgage is not essential to the maintenance of a foreign attachment in assumpsit on the interest coupons, where the execution of the mortgage is not denied, and the defendant does not set up any substantive defence arising upon the mortgage.<sup>6</sup> And the general rule is that the personal liability of the maker of a note, absolute as to the

joint contract. *Cowley v. Patch*, 120 Mass. 137, 138 (1876); *Phillips v. Ward*, 2 Hurl. & C. 717 (1863).

<sup>1</sup> Such as Cal. Code Civ. Proc. § 726; *Hill's Oreg. Code* § 414.

<sup>2</sup> *Barbieri v. Ralelli*, 84 Cal. 154 (1890); s. c. 23 Pac. Rep. 1086; *First National Bank of Butte v. Bell Silver & Copper Mining Co.*, 8 Mont. 32 (1888); s. c. 9 Pac. Rep. 403; *Thompson v. Marshall*, 21 Oreg. 171 (1891), 27 Pac. Rep. 957. *Ante*, §§ 6, 7.

<sup>3</sup> *Thompson v. Marshall*, 21 Oreg. 171 (1891); s. c. 27 Pac. Rep. 957.

<sup>4</sup> *Barbieri v. Ramelli*, 84 Cal. 154 (1890); s. c. 23 Pac. Rep. 1086; *Bartlett v. Cottle*, 63 Cal. 366; *Ould v. Stoddard*, 54 Cal. 613.

<sup>5</sup> *Holmes v. Seashore Electric R. Co. (N. J.)*, 29 Atl. Rep. 419. *Post*, § 253.

<sup>6</sup> *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 161 Pa. St. 391 (1894); s. c. 28 Atl. Rep. 1119.

date of payment, may be enforced prior to that date upon the happening of a contingency which, under the terms of a mortgage securing the note, entitles the mortgagee to elect to declare the whole amount due.<sup>1</sup> But it is thought that a plaintiff in an action to foreclose a mortgage, to whom foreclosure is denied by reason of invalidity of the mortgage, is not entitled to a judgment against the mortgagor upon the bond.<sup>2</sup> Yet, in those cases where the mortgagee issues a general attachment against the mortgagor upon the debt, and obtains a judgment thereunder, he does not *per se* waive his mortgage lien.<sup>3</sup>

It is said that a mortgagee may avail himself of any undertaking made with the mortgagor for the payment of the mortgage indebtedness, to the extent that the mortgagor might enforce such undertaking.<sup>4</sup>

§ 11. Results of foreclosure.—The natural result of a decree against a mortgagor is to foreclose his interest in the mortgaged estate adverse to the mortgagee, held when the mortgage was executed, whether any particular interest was brought in issue or not;<sup>5</sup> and as long as the decree of foreclosure stands, the mortgagor cannot avoid its effect by averring want of knowledge, when he executed the mortgage on which the decree was taken, or the trust through which he derived title; and that the purchaser at the foreclosure and his assigns had knowledge of the trust.<sup>6</sup> In such a case whatever interest the mortgagor actually had in the land at the time of giving the mortgage,—whether derived as *cestui que trust*, under a deed to a third party and a contemporaneous letter declaring a trust in his favor, or through a deed from the trustee,—was conveyed by the mortgagee; and they are estopped, when parties to a foreclosure pro-

<sup>1</sup> Grand Island Sav. & L. Asso. v. Moore (Neb. 1894), 59 N. W. Rep. 115. See: *Post*, § 7.

<sup>2</sup> Dudley v. Congregation of the Third Order of St. Francis, 138 N. Y. 451 (1833); s. c. 34 N. E. Rep. 281; 53 N. Y. S. R. 192. See: *Ante*, § 7.

<sup>3</sup> Lanahan v. Lawton, 50 N. J. Ch. 276 (1891); s. c. 23 Atl. Rep. 476.

<sup>4</sup> Episcopal City Mission v. Brown, 43 Fed. Rep. 834 (1890).

<sup>5</sup> Gaylord v. City of Lafayette, 115 Ind. 423 (1888); s. c. 17 N. E. Rep. 899; 15 West Rep. 479.

ceeding, from asserting such interest while the judgment stands.<sup>1</sup> But a judgment in foreclosure does not bind the mortgagor who is not a party, although his grantee is, to whom he has conveyed the mortgaged premises.<sup>2</sup>

§ 11a. Same—Lien of decree—Illinois rule.—The lien created by a decree of foreclosure is not subject to the limitations governing judgments at law, under the Illinois Chancery Act,<sup>3</sup> which provides that all chancery decrees shall be a lien upon all realty respecting which they are made, and that the court may order to be a lien upon realty or personalty or both any decree to perform any act other than the payment of money or to refrain from performing any act, and that such lien shall have the same force and effect and be subject to the same limitations of time as judgments at law.<sup>4</sup>

§ 12. Effects on title of foreclosure and sale.—The natural effect of a foreclosure and sale is to exhaust the mortgage lien as to the property sold; and where the mortgagee becomes the purchaser<sup>5</sup> he cannot, after redemption by a junior incumbrancer, resell the land to enforce payment of an unsatisfied balance of the mortgage debt.<sup>6</sup> It is the universal rule that the foreclosure of a purchase-money mortgage given at the time of the delivery of the deed, by the person named as grantee therein, will extinguish an estate in remainder created only by the habendum, and not by the granting clause of the deed, although the remaindermen are not parties to the foreclosure.<sup>7</sup> But the title of a vendee who gives back a purchase-money mortgage conditioned to be non-transferable, and void upon payment of the note secured thereby, or upon the death of the mortgagee before such payment, is not divested by an

<sup>1</sup> Gaylord v. City of Lafayette, 115 Ind. 423 (1883); s. c. 17 N. E. Rep. 899; 15 West Rep. 479.

<sup>2</sup> Everling v. Holcomb, 74 Iowa 722 (1888); s. c. 39 N. W. Rep. 117.

<sup>3</sup> Ill. Rev. Stat., c. 22, §45.

<sup>4</sup> Kirby v. Runals, 140 Ill. 289

(1892); s. c. 29 N. E. Rep. 697; aff'g. 37 Ill. App. 186.

<sup>5</sup> See: *Post*, § 520.

<sup>6</sup> Anderson v. Anderson, 129 Ind. 573 (1891); s. c. 29 N. E. Rep. 35.

<sup>7</sup> Holmes v. Wintler, 47 Fed. Rep. 257 (1891).



attempted foreclosure void because of failure to comply with the statute.<sup>1</sup>

The effect of foreclosure is not only to divest the mortgagor of all interest in the property, but after a foreclosure sale and redemption, the mortgagee cannot institute a second foreclosure on the ground that an interest note was omitted in computation of the judgment.<sup>2</sup> Yet in some states a sale of mortgaged premises under foreclosure does not affect the right of a previous grantee who is not made a party to the foreclosure action, where the mortgagee has notice of the conveyance.<sup>3</sup> In such states the purchaser of a part of the mortgaged premises, who is not made a party to an action to foreclose the mortgage, although the mortgagee has notice of the conveyance, is not required to refund the purchase money as a condition of recovering the land sold to him.<sup>4</sup> But the general rule is that a junior mortgagee, although not a party to a proceeding to foreclose a senior mortgage, cannot, without offering to redeem from the sale of the mortgaged property thereunder, maintain a bill to foreclose his mortgage against the purchaser at such sale, the mortgagor's equity of redemption thereunder being extinguished by the foreclosure and sale.<sup>5</sup>

§ 13. Who barred by foreclosure.—It is a general rule that a decree of foreclosure is conclusive against a tax title acquired by a defendant after summons, but before decree, and not set up, even though the purchase in the name of the defendant was made for others to whom the certificate was subsequently assigned.<sup>6</sup> But the holder of a prior mortgage whose priority is not drawn in question by a bill to foreclose a junior mortgage is not barred of his prior right by the ordinary decree of foreclosure against him.<sup>7</sup>

<sup>1</sup> *Hollis v. Hollis*, 84 Me. 96 (1891); s. c. 24 Atl. Rep. 581.

<sup>2</sup> *Hanson v. Dunton*, 35 Minn. 189 (1886); s. c. 28 N. W. Rep. 221.

<sup>3</sup> *Bradford v. Knowles*, 86 Tex. 505 (1894); s. c. 25 S. W. Rep. 1117; Rev'g. s. c. 24 S. W. Rep. 1095.

<sup>4</sup> *Id.*

<sup>5</sup> *Rose v. Walk*, 149 Ill. 60 (1894); s. c. 36 N. E. Rep. 555.

<sup>6</sup> *Davis v. Barton*, 130 Ind. 399 (1891); s. c. 30 N. E. Rep. 512.

<sup>7</sup> *Buzzell v. Still*, 63 Vt. 490 (1891); s. c. 22 Atl. Rep. 619; 25 Am. St. Rep. 777.

§ 14. **Subsequent incumbrancers.**—A sale under a mortgage divests the lien of a second mortgagee whose description includes a portion of the land included in the prior mortgage, as to such portion, and passes a good title to the purchaser.<sup>1</sup>

§ 15. **Foreclosure as a payment of the debt.**—The principle is well settled that where the foreclosure of a mortgage,—by whatever method the mortgage is foreclosed,—becomes perfected, the mortgage debt thereby becomes paid and discharged, in all those cases where the mortgaged premises are of sufficient value,<sup>2</sup> but it is otherwise where the amount of the money or the value of the property received on foreclosure is insufficient to discharge the indebtedness.<sup>3</sup> Thus it is held that the foreclosure of a mortgage according to the mode prescribed by the New Hampshire statute<sup>4</sup> upon a part of the mortgaged premises, the value of which exceeds the amount due on the mortgage debt, frees the remainder,<sup>5</sup> which was not foreclosed from the mortgage lien. But it has been held by the Supreme Court of Missouri that a city which has purchased property under a deed of trust to itself, and surrendered the notes which the deed was given to secure, may still hold the property for reimbursement when the sale is

<sup>1</sup> *Brundred v. Egbert*, 158 Pa. St. 552 (1893); s. c. 28 Atl. Rep. 142; 24 Pitts. L. J. N. S. 461.

<sup>2</sup> *Perley v. Chase*, 79 Me. 519 (1887); s. c. 11 Atl. Rep. 418; 5 N. Eng. Rep. 312; See: *Vansant v. Allmon*, 23 Ill. 30 (1859); *Wilson v. Wilson*, 4 Iowa 309 (1856); *Hurd v. Coleman*, 42 Me. 182 (1856); *Southard v. Wilson*, 29 Me. 56 (1848); *Briggs v. Richmond*, 27 Mass. (10 Pick.) 391 (1830); s. c. 20 Am. Dec. 526; *Smith v. Packard*, 19 N. H. 575 (1849); *Hunt v. Stiles*, 10 N. H. 466 (1839); *Paris v. Hu'ett*, 26 Vt. 308 (1854); *Lovell v. Leland*, 3 Vt. 581 (1831).

A contrary view seems to have

been maintained in the early case of *Strong v. Strong*, 2 Ark. (Vt.) 379 (1827), but the doctrine of that case is not now the rule of the state in which it was rendered.

An assignee foreclosing the foreclosure will have the same effect, even though he holds only a portion of the mortgage debt. See: *Johnson v. Candage*, 31 Me. 28 (1849); *Brown v. Taylor*, 74 Mass. (8 Gray) 135 (1857); s. c. 69 Am. Dec. 239.

<sup>3</sup> *Dearborn v. Nelson*, 61 N. H. 249 (1881).

<sup>4</sup> N. H. Gen. Laws, c. 136, § 14.

<sup>5</sup> *Ray v. Scripture* (N. H. 1892); 29 Atl. Rep. 454.



declared void, the debt still remaining unpaid.<sup>1</sup> And after a foreclosure is perfected and the debt satisfied the validity of a mortgage executed to a foreign corporation, not having an office or known place of business in the state where the land is situated, can not be called in question.<sup>2</sup>

The effect of a judgment *in personam* against a payee of promissory notes, secured by a special mortgage, and in which there is a recognition of the mortgage and a decree for its enforcement is to merge the notes completely and perfectly, so that thereafter the judgment is the only evidence of the debt; but such is not the case as to the mortgage. It retains the full force, effect and rank after the judgment that it had before. In some states, or in Louisiana, the judgment only renders the mortgage executory by ordinary *feri facias*, but not precluding executory proceedings subsequently.<sup>3</sup>

§ 15a. Same—Connecticut doctrine.—Under the Connecticut statute<sup>4</sup> providing that the foreclosure of a mortgage shall be a bar to any further action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure, applies to all foreclosures, strict as well as by judicial sale, of mortgages on personalty as well as on real property.<sup>5</sup>

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<sup>1</sup> City of St. Louis v. Priest, 103 Mo. 652 (1891); s. c. 15 S. W. Rep. 988.

<sup>2</sup> Craddock v. American Freehold Land Mortgage Co., 88 Ala. 281 (1890); s. c. 7 So. Rep. 196.

<sup>3</sup> Lalane v. Payne, 42 La. An. 152 (1890); s. c. 7 So. Rep. 481.

<sup>4</sup> Conn. Gen. Stat. § 3010.

<sup>5</sup> Ansonia Nat. Bank's Appeal, 58 Conn. 257 (1890); s. c. 18 Atl. Rep. 1030; 20 Atl. Rep. 394.

## CHAPTER II.

### COURTS—JURISDICTION AND VENUE.

§ 16. In general—Courts of equity—jurisdiction.	§ 19b. Same—Louisiana rule.
17. Trial by jury.	23a. Same—Under Iowa code.
19. Jurisdiction of state courts.	25a. Venue—Under Alabama code.
19a. Same—Land in two states.	25b. Same—Under California code.

§ 16. In general—Courts of equity—Jurisdiction.—Courts of equity have inherent original jurisdiction of actions to foreclose mortgages, and a condition in a deed of trust stipulating that the premises mortgaged shall not be sold under proceedings either at law or equity, but that the mode of sale provided by the mortgage shall be exclusive of all others, will not oust the jurisdiction of the courts. Only the grantor and his assigns can take advantage of this covenant; purchasers at a judicial sale cannot.<sup>1</sup>

It has been said that when the holder of a note and mortgage securing the same proceeds to the sale of the mortgaged property, under a decree of foreclosure, he has submitted his claim to the equitable remedy; and when a court of equity has become possessed of the case, its authority continues, subject only to the appellate authority, until the matter is completely and finally disposed of; and no court of coordinate authority is at liberty to interfere with its action.<sup>2</sup>

§ 17. Trial by jury.—Where an answer is filed to an interplea, to the effect that the mortgages under which the interpleader in the attachment proceedings claims the property were made to hinder, delay and defraud the creditors of the defendant, and were therefore void, raises an issue properly triable by a jury.<sup>3</sup> The supreme court of Pennsyl-

<sup>1</sup> Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co., 39 U. S. 137 (1890); bk. 35 L. ed. 116; s. c. 11 Sup. Ct. Rep. 512; 45 Am. & Eng. R. Cas. 689.

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<sup>2</sup> Shields v. Riopelle, 63 Mich. 458 (1886); s. c. 30 N. W. Rep. 90; 6 West. Rep. 164.

<sup>3</sup> Caruth-Byrnes Hardware Co. v. Wolter, 91 Mo. 484 (1887); s. c. 3 S. W. Rep. 865; 8 West. Rep. 591.

vania say, in the case of *First National Bank of Jamestown v. Scofield*,<sup>1</sup> that affidavits in an action for foreclosure of a mortgage are sufficient to entitle the defendant to a trial by jury, where they show that the mortgage was executed while the mortgagors were unfitted to do business, and upon the representation of the common attorney of the mortgagors and the mortgagee that the mortgage would be held solely for the protection of one of the mortgagors against the creditors of her husband, the other mortgagor, and that in no event was the mortgage to be resorted to until the exhaustion of other securities held by the mortgagee, and that such security has not been exhausted.

§ 19. **Jurisdiction of court.**—A mortgagee may proceed in equity for a sale of the mortgaged premises immediately after default in payment, although the mortgage contains a power of sale which cannot be exercised until after the lapse of a named period.<sup>2</sup> And a court of equity has jurisdiction to foreclose a mortgage containing a power of sale.<sup>3</sup> The reason for this is because a power of sale in a trust deed given merely as security for a debt, and providing for redemption upon payment, does not prevent a resort to a court of equity for its foreclosure.<sup>4</sup>

§ 19a. **Same—Land in two states.**—It is held in New York that the supreme court can take jurisdiction of the foreclosure of a mortgage where a portion of the mortgaged premises lies in another state, and may order the mortgagor to execute a conveyance thereof in performance of the covenant in the mortgage; and also that such order, although not originally prayed, can be granted, even after report of sale, by way of amendment.<sup>5</sup>

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<sup>1</sup> 168 Pa. St. 407 (1895); s. c. 31 Atl. Rep. 1016; 36 W. N. C. 361, 362.

<sup>2</sup> *Allan v. Manitoba & N. W. R. Co.*, 10 Manit. Rep. 106 (1894).

<sup>3</sup> *Martin v. Ward*, 60 Ark. 510 (1895); s. c. 37 S. W. Rep. 1041.

<sup>4</sup> *Dupee v. Rose*, 10 Utah 305 (1894); s. c. 37 Pac. Rep. 567.

<sup>5</sup> *Union Trust Co. v. Olmstead*, 102 N. Y. 729 (1886); s. c. 3 Cent. Rep. 840.

§ 19b. **Same—Louisiana rule.**—In Louisiana, a probate court, which has not acquired jurisdiction over mortgaged property by an omission or commission or laches of the mortgage creditor, whose contract contains the *pact de non alienando*, has no authority to order the sale of the property affected to him on terms different from those which he is entitled to fix, and which injuriously affect his right;<sup>1</sup> and where a mortgage creditor, under a *pact de non alienando*, who applies for executory process shortly after the maturity of his claim, before the death of his debtor, and within thirty days after the opening of the succession, is not dilatory, and jurisdiction in the probate court does not attach.<sup>2</sup> The *pact* authorizes the creditor to subject the property to payment of his claim, without regard to any subsequent alienation or incumbrances of the same.<sup>3</sup>

§ 23a. **Same—Under Iowa code.**—It has been said that, under the Iowa code, the principle that when a court has no jurisdiction of the subject-matter it cannot be conferred by consent, does not apply to a sale of mortgaged property under the terms of a so-called decree of the Iowa superior court, which has jurisdiction of a suit to foreclose a mortgage, but cannot issue process for the sale, where the sale is made under an agreement of the parties that the court has jurisdiction, and the sale shall be made without right of redemption and convey all the interest of all the parties since the sale is not made by order of the court, but by consent of the parties.<sup>4</sup>

§ 25a. **Venue—Under Alabama code.**—In the case of *Reeves v. Brown*,<sup>5</sup> it is said that in an action to foreclose a mortgage on land situated in another county than the one in which the mortgagor resides may, under the Alabama code,<sup>6</sup> be brought in either county, at the will of the complainant.

<sup>1</sup> Thompson's succession, 42 La. An. 118 (1890); s. c. 7 So. Rep. 477.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *International Trust Co. v. Keokuk Electric Street Railway & Power*

*Co.*, 90 Iowa 90 (1894); s. c. 57 N. W. Rep. 712.

<sup>5</sup> 103 Ala. 537 (1894); s. c. 15 So. Rep. 824.

<sup>6</sup> § 3421.

§ 25b. Same—Under California code.—In the case of *Graham v. Stewart*,<sup>1</sup> a complaint alleging that the mortgage was duly recorded in the office of the recorder of San Diego county, and describing the premises as Lot G in Block 93 in Horton's Addition to San Diego county, as per maps on file, etc., was held to sufficiently allege the situation of the property; and also that judicial notice being taken there is but one such county, the supreme court of the county had jurisdiction. The court say: "The mortgage was not void for want of sufficient description of the property; and the property was sufficiently described for the exercise of the jurisdiction of the court. But even if the description were indefinite, it would be no objection to the enforcement of the mortgage against the mortgagor. In an action for foreclosure of mortgage as it is written, a mortgagor can not be heard to complain of an indefinite description of the property mortgaged, whatever might be the effect of a sale under the description."

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<sup>1</sup> 68 Cal. 374 (1886); s. c. 9 Pac. Rep. 555.

<sup>2</sup> Citing; *Whitney v. Buckman*, 13 Cal. 536; *Tryon v. Sutton*, 13 Cal. 490.

## CHAPTER III.

### WHEN FORECLOSURE MAY BE COMMENCED.

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| <p>§ 33. Right to foreclose.</p> <p>33a. Same—Equitable assignment of part of debt.</p> <p>34. When right to foreclose accrues.</p> <p>34a. Same—Before debt is due.</p> <p>34b. Same—On abandonment of premises.</p> <p>34c. Same—In case of death of mortgagor.</p> <p>34d. Same—On default in payment of interest.</p> <p>34e. Same—Corporate bonds—Request of holder.</p> <p>34f. Same—Notice to quit.</p> <p>34g. Same—Prosecution of suit.</p> <p>34h. Same—Stipulation for delay and waiver.</p> <p>34i. Same—Where given for indemnity.</p> <p>34j. Same—Where given for support.</p> <p>35. Previous demand not necessary.</p> <p>36. Interest clause—Breach making mortgage due.</p> <p>36a. Same—Under Michigan statute.</p> <p>36b. Same—Part payment of interest—Effect.</p> <p>36c. Same—Payment after suit.</p> <p>36d. Same—Waiver of right of for-</p> | <p>feiture.</p> <p>§ 41. Mortgage payable in installments.</p> <p>42. Failure to pay interest.</p> <p>42a. Same—What not a payment.</p> <p>42b. Same—By corporation—Funds out of which payable.</p> <p>42c. Same—Refusal to accept payment—Effect.</p> <p>43. Failure to pay taxes.</p> <p>43a. Same—Exercise of option.</p> <p>43b. Same—Payment after default.</p> <p>44. Election of mortgagee that debt become due.</p> <p>44a. Same—Demand not necessary.</p> <p>44b. Same—Waiver of right—What is.</p> <p>45. Notice of election.</p> <p>45a. Same—Service of notice.</p> <p>46. Who may exercise option to declare debt due.</p> <p>48. Where mortgagee holds one mortgage securing several notes.</p> <p>49. Where mortgagee holds more than one mortgage on same property securing different debts.</p> <p>50. Indemnity mortgages — Default.</p> <p>50a. Same—Foreclosure of.</p> <p>53. Extension of time of payment.</p> |
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§ 33. Right of foreclosure.—With every mortgage there exists an inherent right to foreclose, and this right may be exercised either by the mortgagee, his assignee, or personal representative; and in those cases where the mortgage is executed to a person in his official capacity, it may

(1044)



be foreclosed by such person or his successor or successors in office.<sup>1</sup> This inherent right of foreclosure is not affected by the commencement of an action by a prior mortgagee to foreclose his mortgage, where the second mortgagee has first commenced an action of foreclosure. In such a case such second mortgagee may proceed therein and have the first mortgage paid out of the proceeds of the sale made under his foreclosure.<sup>2</sup>

In general terms the right to foreclose means the power to cut off a right to redeem given by equity, when, under a condition of the mortgage, the mortgagee's estate has become absolute at law;<sup>3</sup> but it is thought that an agreement between the mortgagor and the mortgagee to the effect, that after a formal foreclosure the mortgagor shall remain in possession, paying interest on the debt as rent, and have a reconveyance by paying the whole debt, may defeat the foreclosure.<sup>4</sup>

**§ 33a. Same—Equitable assignment of part of debt.**—It is a well settled principle that an equitable assignment by a prior mortgagee of a portion of the indebtedness will not affect his right to foreclose, if he has retained the legal title as well as a large equitable interest.<sup>5</sup>

**§ 34. When right to foreclose accrues.**—Generally speaking a mortgage may be foreclosed when the money secured thereby becomes due and remains unpaid,<sup>6</sup> and this

<sup>1</sup> Norton v. Ohrns, 67 Mich. 612 (1887); s. c. 35 N. W. Rep. 175; 12 West Rep. 415.

<sup>2</sup> Guilford v. Jacobie, 69 Hun. (N.Y.) 420 (1893); s. c. 23 N. Y. Supp. 462; 52 N. Y. S. R. 837.

<sup>3</sup> Shepard v. Richardson, 145 Mass. 32 (1887); s. c. 11 N. E. Rep. 738; 4 N. Eng. Rep. 305.

<sup>4</sup> Scott v. Childs, 64 N. H. 566 (1888); s. c. 15 Atl. Rep. 206; 6 N. Eng. Rep. 93.

<sup>5</sup> Boone v. Clarke, 129 Ill. 466 (1889); s. c. 21 N. E. Rep. 850.

<sup>6</sup> Under Nebraska Code, § 851.

no proceedings shall be had to foreclose a mortgage after a judgment at law has been obtained, until an execution has been issued on the judgment and returned unsatisfied. Hargreaves v. Menken (Neb. 1895), 63 N. W. Rep. 951.

**Return of an attachment** pending an action at law, in which judgment is obtained, is not sufficient to authorize a foreclosure under such statute. Hargreaves v. Menken (Neb. 1895), 63 N. W. Rep. 951.

**On failure to pay interest;** See: *Post* § 42.



right is not taken away, or in any wise impaired, by the mortgagee's effort to subject the equity of redemption to the payment of a judgment rendered on a debt not secured by the mortgage.<sup>1</sup> But a mortgage to secure two notes payable in successive years, reciting that its purpose or consideration is security of payment on the date of the maturity of the latter note, cannot be foreclosed for default in payment of the first note at the time it matures.<sup>2</sup> And a provision in a trust deed authorizing a trustee's sale of the property on default in the payment of any of the notes secured thereby, at the instance of the legal holder thereof, does not authorize such sale at the instance of the holder of only one of such notes without the consent of the others.<sup>3</sup>

It has been said that a provision of a mortgage of stock and securities by a railroad company, that after default in interest for more than six months the trustee may, and upon demand of not less than a majority in amount of the bonds shall, declare the principal due and payable, and in either of such cases may, and upon request of a majority in amount of the bonds shall proceed to sell the stock; and that at any time prior to the sale the holders of a majority in amount of all the bonds may notify the trustee of their desire to revoke the declaration that the principal is due; and that he shall take no further steps to sell the securities until another default, does not make the remedy of foreclosure, as vested in the trustee, subject to the absolute control of the holders of a majority in amount of the bonds secured, and exclusive of any remedy through a court of chancery.<sup>4</sup>

The general rule is that a foreclosure and sale under a mortgage given to secure notes is proper upon proof that they are due and unpaid, are lost, and have never been sold

<sup>1</sup> Porter v. Wheeler (Ala. 1895), 17 So. Rep. 221.

<sup>2</sup> Keith v. McLaughlin (Ala. 1895), 16 So. Rep. 336.

<sup>3</sup> Bomar v. West, 87 Tex. 299 (1894); s. c. 28 S. W. Rep. 519.

<sup>4</sup> Toler v. East Tennessee, V. & G. R. Co., 67 Fed. Rep. 168 (1894).

or disposed of.<sup>1</sup> And where a mortgage is given to indemnify<sup>2</sup> for indorsements and future advances to pay off outstanding judgments against the mortgagor and to save his property from sacrifice, the mortgagee has the right to foreclose such mortgage by advertisement at its maturity, and is not obliged to wait until he has actually paid off the outstanding judgments.<sup>3</sup> But where the estate of the mortgagor expires before the decree of foreclosure and sale, this will permit a foreclosure on a leasehold,<sup>4</sup> and in those cases where, as in Welsh mortgages,<sup>5</sup> the mortgagee's estate never becomes absolute, there never can be a foreclosure,<sup>6</sup> for the reason that as long as the mortgagor still has a right to redeem, the mortgagee cannot foreclose.<sup>7</sup> It has been said that although the failure expressly to fix a limit to the time for redemption does not necessarily take away the usual remedies of the mortgagee,<sup>8</sup> in some cases, where no time was fixed by the deed beyond which the mortgagor could not defeat the mortgagee's estate by payment, the foundation for foreclosure has been thought to be wanting.<sup>9</sup>

It is thought the fact that a mortgagee has entered to foreclose will not preclude the maintenance of a writ of entry to foreclose and for a conditional judgment, since the defense that the demandant has actual and peaceable

<sup>1</sup> Allendorph v. Ogden, 28 Neb. 201 (1889); s. c. 44 N. W. Rep. 220.

<sup>2</sup> As to when indemnity mortgage may be foreclosed; See: *Post*, § 50.

<sup>3</sup> Lewis v. Duane, 141 N. Y. 302 (1894); s. c. 57 N. Y. S. R. 410; 36 N. E. Rep. 322.

<sup>4</sup> Conn v. Towner, 86 Iowa 577 (1892); s. c. 53 N. W. Rep. 320.

<sup>5</sup> See: 3 Kerr on Real Property, § 2046.

<sup>6</sup> Shepard v. Richardson, 145 Mass. 32 (1887); s. c. 11 N. E. Rep. 738; 4 N. Eng. Rep. 305; See: Yeates v. Ham-

bly, 2 Ark. 360 (1742); Adams Eq. 125, 126.

As to what claims may be foreclosed; See: *Post*, § 256.

<sup>7</sup> Shepard v. Richardson, 145 Mass. 32 (1887); s. c. 11 N. E. Rep. 738; 4 N. Eng. Rep. 305; See: Bonham v. Newcomb, 1 Vern. 232 (1683); s. c. 2 Vent. 364.

<sup>8</sup> See: Balfe v. Lord, 2 Drury & W. 480, 489.

<sup>9</sup> Shepard v. Richardson, 145 Mass. 32 (1887); s. c. 11 N. E. Rep. 738; 4 N. Eng. Rep. 305; See: Teulon v. Curtis, 1 Young 610 (1832).

possession, available in an ordinary writ of entry, does not apply in mortgage foreclosures.<sup>1</sup>

In the case of *Thomas v. Thomas*<sup>2</sup> it is held that under a trust deed for a sale of land to pay debts which are shown to amount to \$12,000 or more, where the proceeds of the personal property amount to only \$250.87 and the lands are worth not more than \$10,000, there can be no necessity for delaying a sale of the lands until after distribution of the proceeds of the personalty.

§ 34a. **Same—Before debt is due.**—The general rule is that where an action is brought to foreclose a mortgage before the debt is due, the action will be dismissed with costs,<sup>3</sup> consequently a mortgage payable on or before a specified date cannot before such date be enforced against a purchaser subject thereto at the suit of one who took a conveyance of the land for the purpose of selling it to pay the mortgage and a debt due himself, and reconveyed it to the original owner upon the understanding that the latter would make the sale and pay such debts.<sup>4</sup> Yet a provision in a mortgage stipulating that the mortgagee may proceed to subject the security to the satisfaction of the debt upon default in any of the provisions of the mortgage, may be enforced, although it is given to secure a promissory note which is not yet due.<sup>5</sup> Under the Georgia code,<sup>6</sup> although when the term commenced at which the rule *nisi* to foreclose a mortgage was taken, the debt to secure which the mortgage was given was not due, yet if, when the petition and rule *nisi* were presented, the debt had matured, and the rule *nisi* was served on the defendant more than three months before the next term, at which the money due on

<sup>1</sup> *Trustees of Smith Charities v. Connolly*, 157 Mass. 272 (1892); s. c. 31 N. E. Rep. 1058.

<sup>2</sup> 81 Va. 17 (1885).

<sup>3</sup> *Eastwood v. Worrall* (N. J. 1886), 5 Atl. Rep. 180; 3 Cent. Rep. 77.

<sup>4</sup> *Wenzel v. Schultz*, 100 Cal. 250 (1893); s. c. 34 Pac. Rep. 696.

<sup>5</sup> *Taylor v. Alliance Trust Co.*, 71 Miss. 694 (1893); s. c. 15 So. Rep. 121; See: *Post*, § 256.

<sup>6</sup> Ga. Code, §§ 3962, 3964.

the mortgage was required to be paid,—this is all that the mortgagor was entitled to.<sup>1</sup>

§ 34b. **Same -- On abandonment of premises.**—It seems that the abandonment of the premises is a ground of foreclosure where the revenue derived from the operation thereof is relied on for the revenue wherewith to pay the cost of maintenance and interest on the indebtedness. Thus it has been said that an abandonment of and ceasing to operate a canal before its completion, for want of necessary funds, is a breach of a mortgage executed by legislative authority to secure preferred bonds made payable out of the canal's revenues, conditioned that the company may retain the management and collect the revenues so long as it complies with the contract, but that the mortgagees may take possession in case of its noncompliance for any cause except deficiency of revenue from a failure of business without the company's fault.<sup>2</sup>

§ 34c. **Same—In case of death of mortgagor.**—In those cases where the mortgagee fails to exhibit his mortgage debt as a demand against the estate of a deceased mortgagor, within the statutory time for presenting claims, this fact will not prevent him from foreclosing the mortgage and subjecting the mortgaged property to the payment of the mortgage debt; yet where the claim is not duly presented, the recovery will be limited to the proceeds arising from the sale of the mortgaged property.<sup>3</sup>

In the case of *Andrews v. Morse*,<sup>4</sup> the court say: "It is conceded that no part of the principal debt has been paid, and no ground of invalidity is asserted against the mortgage; nor is any objection made to the enforcement of the lien, except that the debt was not presented to the administrator as a demand against the estate of the deceased

<sup>1</sup> *Hart v. Altmeyer*, 74 Ga. 367 (1884).

<sup>2</sup> *Brown v. Chesapeake & Ohio Canal Co.*, 73 Md. 567 (1891).

<sup>3</sup> *Andrews v. Morse*, 51 Kan. 30 (1893); s. c. 32 Pac. Rep. 640. See: *Post*, § 256.

<sup>4</sup> 51 Kan. 30 (1893); s. c. 32 Pac. Rep. 640.

mortgagor. This objection is not good. The death of the mortgagor did not impair or affect the lien of the mortgage. It did not place the mortgagee who had a lien in the same position as an unsecured creditor, and remit him to the general assets of the estate to satisfy his lien. If he looks to the personal assets in the hands of the administrator for payment of his debt or any part of it, he must then present his demand under the statute. If he fails to present it within the three-year period, he can obtain nothing from the general assets, and is limited to the proceeds arising from the sale of the mortgaged property. An equitable claim like the plaintiff's is enforceable in the district court, and is not such a demand as the statute referred to contemplates. Neither the presentation of the claim in the probate court nor the failure to present it precludes the foreclosure of the mortgage lien until the mortgage debt has been paid or extinguished.<sup>1</sup> A like limitation was before the supreme court of Iowa, and it held that the limitation of the statute applied only to claims the satisfaction of which is primarily sought out of the personal assets of the decedent, and not upon claims secured by a mortgage upon which the creditor relies for satisfaction. It was declared that the fact that the creditor did not file his claim against the estate within the time prescribed by the statute was not a sufficient defense to an action to foreclose a mortgage executed to secure such claim.<sup>2</sup> There is some diversity of opinion in the different states as to what claims are barred by the failure to present them as demands against the estate, but it is generally held that claims purely equitable in their nature require no presentation or approval. It has been said that 'it would appear to be the better opinion that a creditor may rely upon a mortgage or other specific lien although the claim secured by it has not

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<sup>1</sup> The court cite: *Crooker v. Parsons*, 41 Kan. 410 (1889); s. c. 21 Pac. Rep. 270; *Graham v. Graham*, 38 Kan. 440 (1888); s. c. 17 Pac.

Rep. 152; *Johnson v. Cain*, 15 Kan. 537.

<sup>2</sup> The Iowa case referred to is *Allen v. Maer*, 16 Iowa 307 (1864).

been presented; but in such cases he has no claim upon the general assets in the hands of the administrator.'"<sup>1</sup>

§ 34d. Same—On default in payment of interest.—A foreclosure may be had for nonpayment of an installment of interest, without waiting for a default in the payment of the whole note, principal and interest, under a note payable five years after date, providing that interest shall be payable annually and, if not so paid, shall be compounded annually and bear the same rate as the principal and the mortgage securing it, providing that in default of payment of the note by its terms the mortgagee may foreclose;<sup>2</sup> and in such a case both the principal and the interest of a note may be retained out of the proceeds of a sale under foreclosure in default of payment of interest, under a mortgage providing that if default is made in the payment of the principal or interest of the note secured thereby, the mortgagee is empowered to sell the premises and out of the moneys arising from such sale retain the principal and interest.<sup>3</sup> Thus it has been said where a mortgage provides that, when the interest on the bonds secured thereby shall remain unpaid for sixty days after a demand, the trustee in the mortgage shall, upon request of the holders of seventy-five per cent. of the outstanding bonds, take possession of and operate the property, and shall, upon like request, foreclose the mortgage, this does not limit the power of the trustee to foreclose the mortgage in equity without such request; especially where the mortgage contains the clause that nothing contained in it shall prevent a foreclosure by any court of competent jurisdiction.<sup>4</sup> But

<sup>1</sup> 5 Am. & Eng. Encyc. of L. 213; Woener's Admr., § 409. See: McClure v. Owens, 32 Ark. 443 (1877); Simms v. Richardson, 32 Ark. 297 (1877); McCallam v. Pleasants, 67 Ind. 542 (1879); Moores v. Ellsworth, 22 Iowa 299 (1867); Teel v. Winston, 22 Oreg. 489 (1892); s. c. 29 Pac. Rep. 142; Grafton Bank v. Doe, 19 Vt. 463 (1847); Scammon v.

Ward, 1 Wash. 179 (1890); s. c. 23 Pac. Rep. 439.

<sup>2</sup> Yoakam v. White, (Cal. 1893) 32 Pac. Rep. 238. See: Post, §§ 34h., 42, 256q., 256y.

<sup>3</sup> Davis v. Dodson (Ariz. 1894), 35 Pac. Rep. 1053.

<sup>4</sup> Morgan's L. & T. R. & Steamship Co. v. Texas C. R. Co., 137 U. S. 171 (1890); bk. 34 L. ed. 625;



powers given by the mortgage to the trustee to take possession of the property and sell it, and apply the proceeds to the payment of principal and interest, do not operate to make the principal due upon default in payment of interest, so as to authorize a foreclosure for both.<sup>1</sup>

It has been held that in a case where a railroad company files a bill alleging its insolvency, and praying that it may be sold and its proceeds distributed among its creditors according to their respective priorities, and a receiver is accordingly appointed, a mortgagee who files a cross-bill asking a foreclosure of a mortgage on which default in the interest has been made, but the debt secured by which is not due, is entitled to a foreclosure although by the terms of the mortgage it is not subject to foreclosure until default in payment of the principal at maturity.<sup>2</sup>

**§ 34e. Same—Corporation bonds—Request of holder.**—It is the general rule that the holders of corporate bonds cannot maintain a suit to foreclose a mortgage given to secure them, where the trustee elects not to foreclose, and they have not complied with the provision of the mortgage by making the necessary request, where the mortgage provides that the trustee may be compelled to foreclose upon request of a specified proportion of the bondholders, by making such a request.<sup>3</sup> And it is said that a provision in a mortgage, that no proceeding, in law or equity, shall be taken by any bondholder to foreclose independently of the

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s. c. 9 Ry. & Corp. L. J. 47; 45 Am. & Eng. R. Cas. 631; 11 Sup. Ct. Rep. 61.

In the case of the Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137 (1891); bk. 35 L. ed. 116; s. c. 11 Sup. Ct. Rep. 512; 45 Am. & Eng. R. Cas. 689, it is said that a **condition in a trust deed that on default in the payment of interest or principal for the time stated, the trustees shall, on the written request of sixty per cent. of the bondholders,**

take possession of the property and sell the same in a place named, does not apply to foreclosure proceedings begun in a court of competent jurisdiction to obtain a judicial sale of property.

<sup>1</sup> *McFadden v. Mays Landing & E. H. C. R. Co.*, 49 N. J. Eq. 17 (1891); s. c. 22 Atl. Rep. 932.

<sup>2</sup> *McIlhenny v. Binz*, 80 Tex. 1 (1890); s. c. 13 S. W. Rep. 655.

<sup>3</sup> *Humes v. Company* (Pa. C. P.), 2 Pa. Dist. R. 107; See: *Post*, § 112.



trustee, until after the latter's refusal to comply with a requisition by a certain percentage of the bondholders, is reasonable and valid.<sup>1</sup>

§ 34f. **Same—Notice to quit.**—The supreme judicial court of Massachusetts, in the recent case of the *Trustee of Smith's Charities v. Connolly*,<sup>2</sup> say that notice to a tenant to quit is not an essential prerequisite to a writ of entry to foreclose a mortgage, citing as a precedent for such ruling the prior case of *Smith v. Johns*.<sup>3</sup> In the latter case Judge Bigelow, speaking for the court, says: "It is common learning that, in the absence of any agreement to the contrary, a mortgagee may enter upon the estate under his deed, even before condition broken, and if the mortgagor refuses to quit the possession, the mortgagee may consider him a trespasser, and maintain an action of trespass against him; or he may, in a writ of entry, recover against him as a disseizor. This results from the legal effect and operation of a conveyance in mortgage, by which the legal estate, as against the mortgagor and all persons claiming under him, is vested in the mortgagee, leaving only a right to redeem the estate in the mortgagor."<sup>4</sup> This is under the common law theory of mortgages, and the reasoning is not applicable in those states where the common law doctrine is repudiated.

§ 34g. **Same—Prosecution of suit.**—Where a mortgage is executed as an indemnity to secure the prosecution

<sup>1</sup> *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 246 (1893); 53 N. W. Rep. 1134; 20 L. R. A. 535; See: *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137 (1891); bk. 35 L. ed. 116; 11 Sup. Ct. Rep. 512; 45 Am. & Eng. R. Cas. 689; *Morgan's L. & T. R. Steamship Co. v. Texas Cent. R. Co.*, 137 U. S. 171 (1890); bk. 34 L. ed. 625; s. c. 9 Ry. & Corp. L. J. 47; 11 Sup. Ct. Rep. 61; 45 Am. & Eng. R. Cas. 631.

<sup>2</sup> 157 Mass. 272 (1892); s. c. 31 N. E. Rep. 1058.

<sup>3</sup> 69 Mass. (3 Gray) 517, 519 (1855).

<sup>4</sup> Judge Bigelow cites in support of this proposition: *Bradley v. Fuller*, 40 Mass. (23 Pick.) 1, 9 (1839); *Green v. Kemp*, 13 Mass. 515, 518 (1816); *Goodwin v. Richardson*, 11 Mass. 469, 473 (1814); *Newall v. Wright*, 3 Mass. 138, 155 (1807); *Erskine v. Townsend*, 2 Mass. 493 (1807).

of an action at law, and its obligation is conditional upon the successful prosecution and determination of such suit by the mortgagee for the mortgagor, a failure to prosecute will prevent a recovery on foreclosure.<sup>1</sup>

§ 34h. Same—Stipulation for delay and waiver.—In those cases where the mortgage in express terms provides that no entry under the mortgage shall be made, until six months after default and demand of payment, and the instrument in another clause provides for a sale equally limited, followed by a paragraph saying: "This provision is cumulative to the ordinary remedies by foreclosure in the courts. \* \* \* Upon default being made as aforesaid," six months delay after default is not necessary before instituting suit in foreclosure.<sup>2</sup> The right of foreclosure inherent in every mortgage is a privilege which the mortgagee or holder of the mortgage may exercise, or waive, in his discretion; and where the mortgagee, after foreclosure proceedings commenced or concluded, accepts money to be applied on the mortgage debt, he thereby waives the foreclosure and restores the mortgage.<sup>3</sup>

§ 34i. Same—Where given for indemnity.—A mortgage given as an indemnity for any purpose may be foreclosed on breach, the same as any other mortgage.<sup>4</sup> As to where a breach entitling the holder to commence action of foreclosure has occurred, the reader is referred to the full discussion found elsewhere in this treatise.<sup>5</sup>

§ 34j. Same—Where given for support.—A mortgage given by the mortgagor to secure the faithful execution of a contract to furnish support for another, on breach, may be foreclosed, the same as the ordinary mortgage; but it has been held that there is no breach of a mortgage given

<sup>1</sup> *Lamb v. Scullen*, 61 Mich. 280 (1886); s. c. 28 N. W. Rep. 99; See: *Post*, §§ 34i, 50.

<sup>2</sup> *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. Rep. 221 (1888); s. c. 4 Ry. & Corp. L. J. 362.

<sup>3</sup> *L. R. A.* 397.

<sup>4</sup> *Scott v. Childs*, 68 N. H. 566 (1888); s. c. 15 Atl. Rep. 206; 6 N. Eng. Rep. 913.

<sup>5</sup> See: *Post*, § 50.

<sup>6</sup> See: *Ante*, § 34b; *Post*, § 50.

for a life support, until an application for such support and a failure to furnish it.<sup>1</sup> And a foreclosure will be refused of a mortgage given by one to whom property has been transferred in consideration of future support, to secure such support and the prompt payment of the amounts becoming due upon a prior mortgage on the mortgaged property, and providing that the whole consideration shall become due immediately in case of any default, although the payments on the prior mortgage were not paid at the exact time they became due, where they were paid before the commencement of the foreclosure action and no injury has been done the mortgagee.<sup>2</sup>

§ 35. Previous demand not necessary.—In the absence of a stipulation so providing, after a default, it is not essential that a demand for payment be made before the commencement of an action for foreclosure,<sup>3</sup> especially where the whole sum of principal and interest shall become immediately due on default made in payment of the interest.<sup>4</sup> And a failure to demand payment of mortgage notes upon their maturity is not such laches as will prevent a recovery thereon, it being the business of the maker to seek the holder and pay the debt when due,<sup>5</sup> the only effect of a failure to make a demand at the place where the mortgage was payable is that the plaintiff cannot recover costs if the defendant had the money there to pay the mortgage debt.<sup>6</sup>

Where there is a provision in a mortgage to a trustee to secure bond-holders, that in case default be made in the payment of interest six months after demand therefor the whole principal sum shall become due and

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<sup>1</sup> Coleman v. Whitney, 62 Vt. 123 (1890); s. c. 20 Atl. Rep. 322; 9 L. R. A. 517.

<sup>2</sup> Gilbert v. Shaw, 63 Hun (N. Y.) 148; s. c. 44 N. Y. S. R. 157; 17 N. Y. Supp. 621.

<sup>3</sup> Ferris v. Spooner, 102 N. Y. 10 (1886); s. c. 5 N. E. Rep. 773; 2 Cent. Rep. 489.

<sup>4</sup> Clemens v. Luce, 101 Cal. 432 (1894); s. c. 35 Pac. Rep. 1032; Hewett v. Dean, (Cal. 1891), 25 Pac. Rep. 753.

<sup>5</sup> Hoffacker v. Manufacturers' Nat. Bank (Md. 1892), 23 Atl. Rep. 579.

<sup>6</sup> Norton v. Ohrns, 67 Mich. 612 (1887); 35 N. Y. Rep. 175; 12 West Rep. 415.

payable, and the lien created may at once be enforced, relates solely to the power of sale by the trustee, and will not prevent foreclosure by action for the whole principal upon default in interest without demand and waiting for six months to elapse therefrom.<sup>1</sup>

In those cases where a demand is required by the terms of the instrument, an explicit warning in writing after the maturity of interest coupons attached to bonds, that the holder will look to the corporation for payment, is a demand made in writing within a provision of the mortgage securing the bonds, that if payment of principal or interest be neglected or refused after such a demand the trustee may take possession of and operate or sell the property.<sup>2</sup> When a demand is made, a mortgage sale is not invalidated by the fact that the notice of demand was signed by the sheriff, instead of the clerk, where the objection was not raised by the defendant until after the sale.<sup>3</sup>

§ 36. Interest clause—Breach making mortgage due.—In all cases where the mortgage provides that upon the non-payment of interest or an installment of the principal when due, the whole of the principal and interest shall become due and payable at the option of the mortgagee, or holder of the mortgage, upon a non-payment of the interest or an installment of the principal the mortgage may be foreclosed for the full amount.<sup>4</sup> Thus it has been held where a mort-

<sup>1</sup> *Farmers' Loan & Trust Co. v. Nova Scotia Cent. R. Co.*, 24 N. S. 542 (1892).

<sup>2</sup> *Pennsylvania Co. for Ins. on Lives and Granting Annuities v. The Philadelphia & R. Co.*, 69 Fed. Rep. 482 (1895); s. c. 36 W. N. C. 534.

<sup>3</sup> *Chase v. New Orleans Gaslight Co.*, 45 La. An. 300 (1893); s. c. 12 So. Rep. 308.

<sup>4</sup> *Dean v. Ridgeway*, 82 Iowa 757 (1891); 48 N. W. Rep. 923. See: *Clemens v. Luce*, 101 Cal. 432 (1894); s. c. 35 Pac. Rep. 1032; *Mulcahey v. Strauss*, 151 Ill. 70 (1894); s. c. 37

N. E. Rep. 702, aff'g 52 Ill. App. 252; *Frink v. Neal*, 37 Ill. App. 621 (1890); *Atkinson v. Walton*, 162 Pa. St. 219 (1894); s. c. 29 Atl. Rep. 898; 34 W. N. C. 562; *Swett v. Stark*, 31 Fed. Rep. 858 (1887); *Farmers' Loan & Trust Co. v. Nova Scotia C. R. Co.*, 24 N. S. 542 (1892); *Compare* *Edgar v. Beck*, 96 Mich. 419 (1893); s. c. 56 N. W. Rep. 15.

In *Nova Scotia* the whole principal secured by a mortgage becomes immediately due upon default in the payment of interest, although there is no express provision therefor in the mort-

gage has been given on property in Illinois to secure the payment of promissory notes, containing a covenant that, upon a failure to pay the interest upon the notes as specified, the principal should become due, a *bona fide* purchaser of the notes, upon a failure to pay interest, might foreclose the mortgage for the principal sum, without regard to equities existing between the original parties; and this is so even though one of the notes would not become due for six years.<sup>1</sup> But it is held by the supreme court of the State of Washington that the consideration for coupon notes representing interest upon a principal secured by a mortgage fails when the mortgage is declared due for non-payment of prior interest, and foreclosed therefor, and that no judgment can be had for their amount.<sup>2</sup>

The mortgagee of lands is not deprived of the right to declare the whole of the amount of the mortgage due as provided therein, upon default in the payment of the interest on the whole debt, by the fact that since the execution of the mortgage the mortgagor's property has been placed in the hands of a receiver.<sup>3</sup>

The supreme court of Pennsylvania say that a *scire facias* for the collection of the whole of a mortgage, issued by an assignee thereof for default in payment of an installment of interest, under a provision therein that the whole shall become payable upon default in payment of interest for the space of thirty days, cannot be resisted by a purchaser from the mortgagor, upon the ground that he did not know the address of the owner of the mortgage.<sup>4</sup>

The supreme court of California, in the case of *Clemens v. Luce*,<sup>5</sup> hold a mortgage containing a provision that in case of default in the payment of interest, or any part

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gage. *Farmers' Loan & Trust Co. v. Nova Scotia C. R. Co.*, 24 N. S. 542 (1892).

<sup>1</sup> *Swett v. Stark*, 31 Fed. Rep. 858 (1887).

<sup>2</sup> *Cloud v. Rivord*, 6 Wash. 555 (1893); s. c. 34 Pac. Rep. 136.

<sup>3</sup> *Mulcahey v. Strauss*, 151 Ill. 70

(1894); s. c. 37 N. E. Rep. 702 aff'g 52 Ill. App. 252.

<sup>4</sup> *Atkinson v. Walton*, 162 Pa. St. 219 (1894); s. c. 29 Atl. Rep. 898; 34 W. N. C. 562.

<sup>5</sup> 101 Cal. 432 (1894); s. c. 35 Pac. Rep. 1032.



thereof, according to the conditions of the note secured thereby, the whole sum of principal and interest shall become immediately due, is not in conflict with a note providing for the payment of interest quarterly, and if it is not so paid it is to become a part of the principal and bear a like rate of interest until paid, and the mortgagee may begin foreclosure proceedings upon default in any payment of interest. And it has been said a trust deed authorizing a foreclosure of the whole debt for default in the payment of interest may be foreclosed before the maturity of the note secured thereby, where the maker refuses to correct the mistake thereon making interest payable after, instead of annually before, maturity.<sup>1</sup>

But it is said by the supreme court of New York, in the case of *Price v. Wood*,<sup>2</sup> that a clause in a mortgage for future advancements executed to an attorney by his client, providing that in case semi-annual interest remains unpaid for thirty days, the whole principal sum shall become due and payable, which is given simultaneously with an agreement that the mortgagee shall pay certain indebtedness of the mortgagor, and keep an account of all his services and expenses, and render an account thereof to the mortgagor on demand, and that all payments, services, and expenses shall draw interest from the date rendered, and constitute a part of the sum provided for in the mortgage, is not operative where the mortgagee neglects to furnish an itemized account of his services and disbursements, and interest, and said to the mortgagor, at the execution of the mortgage, said to the mortgagor that such clause was merely formal and that the terms of the agreement would control.

§ 36a. Same—Under Michigan statute.—The supreme court of Michigan say, in the case of *Edgaro v. Beck*,<sup>3</sup> that an installment of interest becoming due by the terms of the mortgage, is included in the Michigan statute<sup>4</sup>

<sup>1</sup> *Frink v. Neal*, 37 Ill. App. 621 (1890).

<sup>2</sup> 76 Hun (N.Y.) 318 (1894); s. c. 27 N. Y. Supp. 691; 59 N. Y. S. R. 137.

<sup>3</sup> 69 Mich. 419 (1893); s. c. 56 N. W. Rep. 15.

<sup>4</sup> How. Mich. Stat. 8498, subd. 4.

providing, among other things, that in cases of "mortgages given to secure the payment of money by installments," each installment, after the first, shall be deemed a separate and independent mortgage, and the mortgage for each installment may be foreclosed as if separate mortgages were given for each subsequent installment; and a redemption from such sale by the mortgagor shall have the same effect as if the sale had been made upon an independent prior mortgage.

§ 36b. Same—Part payment of interest—Effect.—Under a mortgage providing that if at any time default shall be made in the payment of interest for the space of thirty days after it becomes due, the principal sum shall, at the option of the mortgagee, or the legal holder of the mortgage, become due, it is held that payment of the same, with interest, may be enforced and recovered at once, and a payment of a portion only of the interest due will not prevent the mortgagee, or holder of the mortgage, from declaring the whole mortgage debt due and recovering the whole of the principal.<sup>1</sup> Hence, it follows that a mortgagee to whom a check is sent, declaring on its face that it is in full of interest to a date later than its amount will in fact pay, may return the check and avail himself of a clause of the mortgage providing that the whole principal may, at his election, be declared due for default in payment of interest, both because of the insufficiency of amount and because a check is not legal tender.<sup>2</sup> And a mortgagee who has exercised his election under the mortgage to declare the whole amount due for non-payment of interest, after having returned a check for too small a sum, is not thereafter obliged to accept a second check for the interest due, but may return it as tendered too late.<sup>3</sup>

§ 36c. Same—Payment after suit—Effect.—In those cases where the mortgagee, in pursuance of a provision of

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<sup>1</sup> *Smith v. Hooton* (Pa. C. P.), 3 Pa. Dist. Rep. 250 (1893).

<sup>2</sup> *Martin v. Clover*, 45 N. Y. S. R. 44 (1892); s. c. 17 N. Y. Supp. 638.

<sup>3</sup> *Id.*



the mortgage, has declared the whole debt secured thereby due upon the mortgagor's failure to pay an installment of interest, the mortgagor cannot be relieved in equity from foreclosure for the principal upon payment of the interest and costs of the suit.<sup>1</sup> And where the mortgage provides that the entire principal sum shall become due, at the option of the mortgagee, after default in the payment of interest for thirty days, a mortgagor who makes no offer to pay an installment of interest until eight months after it has become due under such provision and an action begun for the foreclosure of the entire mortgage, cannot, by tendering the sum due for interest and costs, be relieved from the express terms of his contract that the entire mortgage shall become due.<sup>2</sup> A mortgagor who is in default in the payment of interest due will not be permitted to pay both principal and interest where the principal is not payable until the death of a third person who is still living, and the interest is payable semi-annually, with a provision that if not paid within thirty days after it becomes due the principal shall also become due, without adding, "at the option of the owner or holder," or any equivalent words.<sup>3</sup>

§ 36d. Same—Waiver of right of forfeiture.—A mortgagee, or the holder of a mortgage providing that on the failure to pay an installment of principal or interest, the whole debt shall become due and payable, at the option of such mortgagee or holder, the mortgagee or the then holder of the mortgage may waive his right to foreclose; but an intention to waive such right must clearly appear. Thus, it has been held that a mere transfer of rents as a satisfaction of the interest due on a trust deed on a given date is not an agreement to forbear claiming a forfeiture of the prin-

<sup>1</sup> Warwick Iron Co. v. Morton, 1 Pa. Adv. Rep. 514 (1892); s. c. 23 Atl. Rep. 1065. See: Martin v. Cleve, 45 N. Y. S. R. 44 (1892); s. c. 17 N. Y. Supp. 638; Osborne v. Ketcham, 76 Hun (N. Y.) 325 (1894); 27 N. Y. Supp. 694; 59 N. Y. S. R. 83.

<sup>2</sup> Osborne v. Ketcham, 76 Hun (N. Y.) 325 (1894); s. c. 27 N. Y. Supp. 694; 59 N. Y. S. R. 83.

<sup>3</sup> Cox v. Kille, 50 N. J. Eq. (5 Dick.) 176 (1892); s. c. 24 Atl. Rep. 1032.

principal and interest on the trust deed under a provision therein, upon a failure to pay the next installment of interest.<sup>1</sup> And a delay of three months, at the mortgagor's request for additional time after default in payment of the interest on a mortgage, is not a waiver of an option given thereby to the mortgagee to declare the whole amount secured thereby due.<sup>2</sup> But the acceptance of a check on April the fourth, in payment of interest on a mortgage in default since March thirty-first, will be inferred to be a waiver of any claims of forfeiture which might have arisen by reason of such default.<sup>3</sup> And it is held that the failure to include in such a check so given, and expressed to be in "full of interest" due April first on a mortgage, the amount of interest on the defaulted interest for the time in default, does not work a forfeiture as to time, the acceptance of the check indicating a purpose to accept the amount in discharge of the interest claim.<sup>4</sup>

§. 41. Mortgage payable in installments.—A stipulation in a mortgage that, on default in the payment of any installment or interest the entire principal may be declared due and payable, is valid,<sup>5</sup> and a bill in equity will be entertained to foreclose for the non-payment of the first or any subsequent installment.<sup>6</sup> Such a provision in a

<sup>1</sup> *Martin v. Land Mortg. Bank of Texas*, 5 Tex. Civ. App. 167 (1893); s. c. 23 S. W. Rep. 1032.

<sup>2</sup> *Hewitt v. Dean* (Cal. 1889), 25 Pac. Rep. 753; s. c. 91 Cal. 5; 27 Pac. Rep. 423; 28 Pac. Rep. 93.

<sup>3</sup> *Smalley v. Renken*, 85 Iowa 612 (1892); s. c. 52 N. W. Rep. 507.

<sup>4</sup> *Id.*

<sup>5</sup> *Cincinnati Hotel Co. v. Central Trust & S. D. Co.* (Supr. Ct. Cin.), 25 Ohio L. J. 375. See: *Phillips v. Taylor* (Ala. 1892), 11 So. Rep. 323; *Fox v. Wharton*, 5 Del. Ch. 200 (1878); *Horn v. Bennett*, 135 Ind. 165 (1893); s. c. 34 N. E. Rep. 956; 24 L. R. A. 804; *Bressler v. Martin*, 34 Ill.

App. 122 (1889); s. c. affd. 133 Ill. 278; s. c. 24 N. Y. Rep. 518; *Penouilh v. Abraham*, 44 La. An. 188 (1892); s. c. 10 So. Rep. 676; *Meier v. Meier*, 105 Mo. 411 (1891); s. c. 16 S. W. Rep. 223; *Maitland v. Godwin*, 19 N. Y. Supp. 275 (1892); s. c. 46 N. Y. St. Rep. 959; *Gillmour v. Ford* (Tex. 1892), 19 S. W. Rep. 442.

And this is true even though required to be by an instrument in writing under seal, and a copy served on the mortgagor. *Cincinnati Hotel Co. v. Central Trust & S. D. Co.* (Super. Ct. Cin.), 25 Ohio L. J. 375.

<sup>6</sup> *Fox v. Wharton*, 5 Del. Ch. 200 (1878). See: *Penouilh v. Abraham*,

mortgage applies to contemplated future advances where the existing indebtedness is not payable in installments.<sup>1</sup> Hence, a clause in a bond accompanying a mortgage, although not in the latter instrument, making the whole amount due upon default as to an installment, and a provision in the mortgage that upon default in the payment of any part the mortgagee may sell and retain the amount due on the bond, entitle the mortgagee to foreclose the whole mortgage upon default in the payment of an installment.<sup>2</sup> And where the mortgage makes the whole amount due upon default as to one installment, at the option of the mortgagee, a foreclosure suit to enforce the payment of the first installment is no bar to a suit for the second, the mortgagee not having exercised his option to declare the whole amount to be due upon the first default.<sup>3</sup> Hence, it follows that a further default made upon a mortgage subsequent to a decree of foreclosure for a prior partial default entitles the possessor of the decree to an order founded on such decree directing a sale to satisfy the amount due.<sup>4</sup>

In those cases where the entire amount is to become due and payable upon the failure to pay the first installment, the mortgagee, or holder of the mortgage, may elect to foreclose upon such default either for the installment or the whole amount, but he will not be entitled to the appointment of a receiver to take charge of the property and collect rent until the maturity of all, and then to foreclose.<sup>5</sup>

§ 41a. Same—Securing several notes.—A mortgage providing that all of a series of notes secured thereby shall

44 La. An. 188 (1892); s. c. 10 So. Rep. 676.

A writ of seizure and sale of mortgaged property is not prematurely issued when one installment of the mortgage debt is due. *Penouilh v. Abraham*, 44 La. An. 188 (1892); s. c. 10 So. Rep. 676.

<sup>1</sup> *Dunn v. Sharpe*, 9 Misc. (N. Y.) 636 (1894); s. c. 62 N. Y. S. R. 108; 30 N. Y. Supp. 353.

<sup>2</sup> *Maitland v. Godwin*, 19 N. Y.

Supp. 275 (1892); s. c. 46 N. Y. S. Rep. 959.

<sup>3</sup> *Bressler v. Martin*, 133 Ill. 278 (1890); s. c. 24 N. E. Rep. 518; affg. s. c. 34 Ill. App. 122; *Brand v. Smith*, 99 Mich. 395 (1894); s. c. 58 N. W. Rep. 363.

<sup>4</sup> *Brand v. Smith*, 99 Mich. 395 (1894); s. c. 58 N. W. Rep. 363.

<sup>5</sup> *Phillips v. Taylor* (Ala. 1892), 11 So. Rep. 323.

become due upon default in the payment of any of them, may be foreclosed, either for the notes due and unpaid, or for the entire series,<sup>1</sup> on a proper rebate of the interest on the notes not yet due, or some other equitable adjustment.<sup>2</sup> Thus, it has been said that a provision in a trust deed stipulating that upon default in the payment of any one of the notes secured all shall become due, is valid and gives the trustee full authority to sell the mortgaged premises for payment of all the notes.<sup>3</sup>

Under a mortgage to secure several notes, and providing that upon failure to pay any one of them, all of them shall become due and payable, the notes first due by their terms and transferred by the original mortgagee have preference over those of later dates of maturity until fully satisfied, whether the later notes are held by the original mortgagee or a subsequent assignee.<sup>4</sup> But it is said that an extension of the time of payment of the first notes secured by a trust deed is not a waiver of an option given therein to declare the whole amount due upon a failure to pay subsequent notes.<sup>5</sup>

In all cases where the mortgage provides that upon default in the payment of the first of several mortgage notes, the whole become due, the payment of the first note does not restore the others to their original standing;<sup>6</sup> but matters tending to show an excuse for not paying the first note at maturity, by reason of an agreement to extend the time, will constitute a plea in abatement.<sup>7</sup>

<sup>1</sup> *Phillips v. Taylor* (Ala. 1892), 11 So. Rep. 323; *Gillmour v. Ford* (Tex. 1892), 19 S. W. Rep. 442. See: *Meier v. Meier*, 105 Mo. 411 (1891); s. c. 16 S. W. Rep. 223.

<sup>2</sup> *Gillmour v. Ford* (Tex. 1892), 19 S. W. Rep. 442.

<sup>3</sup> *Meier v. Meier*, 105 Mo. 411 (1891); s. c. 16 S. W. Rep. 223.

<sup>4</sup> *Horn v. Bennett*, 135 Ind. 165 (1893); s. c. 34 N. E. Rep. 321; 24 L. R. A. 800.

<sup>5</sup> *Brown v. McKay*, 151 Ill. 315 (1894); s. c. 37 N. E. Rep. 1037; aff'g. s. c. 51 Ill. App. 295.

<sup>6</sup> *Moore v. Sargent*, 112 Ind. 484 (1887); s. c. 14 N. E. Rep. 466; 12 West Rep. 119; *Rogers v. Watson*, 81 Tex. 400; s. c. 17 S. W. Rep. 29.

<sup>7</sup> *Moore v. Sargent*, 112 Ind. 484 (1887); s. c. 14 N. E. Rep. 466; 12 West Rep. 119.

§ 42. **Failure to pay interest.**—It has been said that a foreclosure can be had merely for the amount of interest due, when the principal is not yet due, and the mortgage does not contain the condition that the principal shall be due upon default in payment of interest,<sup>1</sup> although the principal debt is not yet mature, and is held by another person who is made a party to the suit.<sup>2</sup> And a power given the trustees in a deed of trust to secure a principal note and a series of interest notes, to sell “upon default or failure being made in the payment of the said notes, or of any installment of interest thereon, when and as the same shall become due and payable” is not limited to the interest payable on the interest notes after maturity, and not due until the maturity of the principal note, but includes default in payment of any of the interest notes.<sup>3</sup> But upon a foreclosure for interest on a mortgage upon which the principal is not due, only so much of the property as is necessary to raise the amount due should be sold, in those cases where the mortgaged property is capable of division.<sup>4</sup> And property in the hands on a receiver in a suit for the foreclosure of a mortgage so far as the interest was in default only will not be sold under an interlocutory order on the petition of junior mortgagees who have intervened, so as to discharge the lien of prior mortgages which are not yet due, where the intervenors contest the validity of such mortgages and the question is still pending and undetermined.<sup>5</sup>

<sup>1</sup> *Winchell v. Coney*, 54 Conn. 24 (1886); s. c. 5 Atl. Rep. 354; 2 N. Eng. Rep. 327; *Cleveland v. Booth*, 43 Minn. 16 (1890); s. c. 44 N. W. Rep. 670.

<sup>2</sup> *Cleveland v. Booth*, 43 Minn. 16 (1890); s. c. 44 N. W. Rep. 670.

**A suit cannot be maintained** upon notes secured by mortgage prior to their maturity, for a personal judgment against one who has agreed to pay them, under a clause of the mortgage that the whole principal shall become due if the interest remains in

arrears for ninety days, where the notes do not contain such stipulation. *Tobin v. Smith*, Ohio Dec. 675; s. c. 1 Ohio N. P. 75 (1894).

<sup>3</sup> *Wheeler v. McBlair*, 5 App. Cas. D. C. 375 (1895); s. c. 23 Wash. L. Rep. 153.

<sup>4</sup> *McFadden v. Mays Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176 (1891); s. c. 22 Atl. Rep. 932.

<sup>5</sup> *Pennsylvania R. Co. v. Allegheny R. Co.*, 42 Fed. Rep. 82 (1890); s. c. 8 Ry. & Corp. L. J. 63.



It has been said, however, that a mortgage given as security for the payment of a designated sum on a specified date, a number of years after its execution, with annual interest according to the terms of a promissory note providing for a compounding of the interest if unpaid, can not be foreclosed before its maturity, for default in payment of interest.<sup>1</sup> The rule that, when the principal of a mortgage debt cannot be declared due for nonpayment of interest, there can be no foreclosure for such nonpayment, cannot apply where a sale of land is made, and a so-called principal note is given with other notes, in consideration, the amount of which may not be declared due because of its being made a condition of its payment that an outstanding title to a portion of the land shall first be gotten in for the benefit of the mortgagor; and the other notes not being subject to such condition, but payable absolutely; and there being an express covenant of the mortgagor that the other notes may all be declared due upon default of payment of any one of them for a certain time after becoming due.<sup>2</sup>

It is thought, however, that the right to declare the principal of a mortgage due for default in payment of interest is not conferred by authority to the trustee to apply the residue of income upon the principal of outstanding bonds, to cause the property to be sold as an entirety, and a provision that if the trustee is proceeding to sell for default in interest or sinking fund, the mortgagor may, before sale, pay all arrears of interest and expenses and the proceeding shall be discontinued.<sup>3</sup>

§ 42a. **Same—What not a payment.**—It has been said, and the decision is well-founded in principle, that the existence of a debt due from a mortgagee to the mortgagor, which may be set off against the mortgage, does not *ipso facto* pay the interest so as to prevent default by which the

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<sup>1</sup> Van Loo v. Van Aken, 104 Cal. 269 (1894); s. c. 37 Pac. Rep. 925; Compare: *Ante* §§ 34d, 34h and *Post*, §§ 256q, 256y.

<sup>2</sup> Wisner v Chamberlin, 117 Ill.

568 (1886); s. c. 7 N. E. Rep. 68; 5 West Rep. 606.

<sup>3</sup> Grape Creek Coal Co. v. Farmers' Loan & T. Co., 63 Fed. Rep. 891 (1894); s. c. 12 C. C. A. 350.

whole mortgage debt becomes due, in the absence of an agreement to apply it on the mortgage, or of a demand that it be so applied.<sup>1</sup>

§ 42b. Same—By corporation—Funds out of which payable.—It has been held that a provision of a mortgage given by a corporation to secure its bonds, that in the event of the company's failure to provide sufficient means during any half year to pay the interest due at the end thereof the trustee shall, upon request of a majority in interest of all the creditors, declare the mortgage due and proceed to foreclosure, does not require that such interest shall be paid from profits alone, where unexpected loss has made it necessary to either yield possession or pay the interest from the funds.<sup>2</sup>

§ 42c. Same—Refusal to accept payment—Effect.—A mortgagee does not lose his right to declare a mortgage due for nonpayment of interest by his previous refusal to accept payment before the maturity of the mortgage.<sup>3</sup> And a second mortgagee who retains part of the consideration of the mortgage for the purpose of discharging the first mortgage, the owner of which refuses to accept payment as not due, cannot be required to apply the money so retained upon the interest on his own mortgage so as to deprive him of the right to declare his mortgage due for nonpayment of interest.<sup>4</sup>

§ 43. Failure to pay taxes.—Where the mortgage requires the mortgagor to pay the taxes and keep the buildings insured, and provides that a failure in either respect shall authorize the mortgagee to declare the entire mortgage debt to be due, noncompliance with the provisions of the mortgage empowers the mortgagee to declare such mortgage debt due by the tenor of the notes, and to pro-

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<sup>1</sup> Gumpert v. Ell, 4 Pa. Dist. R. 257 (1894); s. c. 7 Kulp 513.

<sup>2</sup> Michigan Trust Co. v. Lansing Lumber Co., 103 Mich. 392 (1894); s. c. 61 N. W. Rep. 668.

<sup>3</sup> Moore v. Keine (Neb. 1895), 61 N. W. Rep. 736.

<sup>4</sup> *Id.*



cure the possession of the premises and the application of the rents to the payment of the indebtedness.<sup>1</sup> But a mortgagor will be relieved from a default in paying an assessment on the mortgaged premises, under an agreement made by the mortgagee for the benefit of the mortgagor to postpone foreclosure during her life if no taxes or assessments remained unpaid more than thirty days, where the default was caused by misinformation to the latter's agent at the proper public office, and she had provided sufficient money to pay such assessment, but knew nothing of it, and paid it as soon as she learned thereof.<sup>2</sup>

§ 43a. **Same—Exercise of option.**—An option in a mortgage to declare the whole sum due and payable immediately in case of default in payment of interest or taxes cannot be exercised by the mortgagee without the authority or concurrence of an assignee who holds it as collateral security.<sup>3</sup> But a mortgagee whose mortgage provides that if any tax or assessment shall remain unpaid for six months the entire debt shall become due, does not lose his rights to declare the mortgage due for such default by extending the time for the payment of the mortgage debt after the default occurs, upon the express condition that nothing in the agreement for extension shall impair the security.<sup>4</sup>

§ 43b. **Same—Payment after default.**—It is said that a default in the payment of taxes by a mortgagor

<sup>1</sup> And this is true even where the mortgage contains a provision therefor notwithstanding a contract with the mortgagor and his tenant for the application of the rents to the payment of an amount due from the mortgagor to a third person. *Nicolls v. Peninsular Stove Co.*, 48 Ill. App. 317.

But it has been said that a clause in a mortgage providing for sale upon default in payment of the debt or interest thereon "or the taxes, or if the insurance is not kept up thereon," is too indefinite and uncertain to authorize foreclosure for failure to pay taxes

or keep up insurance upon the mortgaged premises, where there is no other stipulation in the mortgage that the mortgagor shall pay taxes or keep the premises insured. *Noble v. Greer*, 48 Kan. 41 (1892); s. c. 28 Pac. Rep. 1004.

<sup>2</sup> *Noyes v. Anderson*, 124 N. Y. 175 (1891); s. c. 26 N. E. Rep. 316; 35 N. Y. S. R. 94.

<sup>3</sup> *Shaw v. Williams*, 59 Hun (N. Y.) 447 (1891); s. c. 13 N. Y. Supp. 527; 36 N. Y. S. R. 1002.

<sup>4</sup> *Weber v. Huerstel*, 11 Misc. (N. Y.) 214 (1895); s. c. 66 N. Y. S. R. 564; 32 N. Y. Supp. 1109.

is not ground for declaring the note due, under a clause in the mortgage providing that the whole indebtedness shall become due if the taxes remain unpaid for a given time where they were paid before the commencement of the suit and before the mortgagee had suffered any loss or impairment of his security.<sup>1</sup>

§ 44. Election of mortgagee that debt become due.—It has been said that the holder of a mortgage note, providing that interest is to be payable semi-annually, and, if not so paid, to be compounded semi-annually, or the whole sum of principal and interest to become immediately due and payable at option of the holder, while he exercises his option promptly, may do so at maturity and upon default of any installment of the interest.<sup>2</sup> But the supreme court of New York say that a mortgagee who, for several years, receives interest on the mortgage after it becomes due without claiming the right to avail himself of a provision in the mortgage that if any payment shall remain unpaid for ten days after it becomes due, the whole debt shall immediately become due, at the option of the mortgagee, cannot declare a forfeiture on account of non-payment of an installment of interest for ten days, where the mortgagor has made payments which he could well suppose had entirely paid such installment, and the forfeiture is declared for the purpose of acquiring the mortgagor's property, or causing a reduction in the amount of the principal debt.<sup>3</sup>

§ 44a. Same—Demand not necessary.—The general rule is that where a note secured by mortgage declares that on failure to pay the interest when due, the whole sum of principal and interest shall become immediately due and payable, at the option of the holder, no demand after default, is necessary to support an action to foreclose for the

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<sup>1</sup> Smalley v. Renken, 85 Iowa 612 (1892); s. c. 52 N. W. Rep. 507; Shaw v. Wellman, 59 Hun (N. Y.) 447 (1891); s. c. 13 N. Y. Supp. 527; 36 N. Y. S. R. 1002.

<sup>2</sup> Campbell v. West, 86 Cal. 197 (1890); s. c. 24 Pac. Rep. 1000.

<sup>3</sup> French v. Row, 77 Hun (N. Y.) 380 (1894); s. c. 69 N. Y. S. R. 396; 28 N. Y. Supp. 849.

entire sum,<sup>1</sup> because such action is exercised by the preparation of a bill for the foreclosure thereof, and authorizing the same to be filed, where no notice is therein required to be given to the debtor of its exercise.<sup>2</sup>

§ 44b. **Same—Waiver of right—What is.**—It has been said that forbearance by a mortgagee to elect within a reasonable time after a default in interest, to treat the whole sum as due, does not defeat his right, especially where, in an action to foreclose, defendants do not allege waiver of such right, or offer to pay the interest which they concede to be due.<sup>3</sup> Thus a delay of fifty-nine days,<sup>4</sup> or three months,<sup>5</sup> in electing to take advantage of the option to declare the principal sum secured by mortgage due by reason of non-payment of interest is not, as a matter of law, an unreasonable one; and is not evidence of a waiver of the stipulation that the whole shall become due upon default in the payment of an installment of interest.<sup>6</sup>

§ 45. **Notice of Election.**—At the time when the second edition of this treatise was prepared<sup>7</sup> there was a conflict of decision as to whether in those cases where a mortgage contains a provision that the whole debt shall become due, at the option of the mortgagee or the holder, on failure to pay any installment of interest or principal, formal notice of the exercise of the option is requisite. In all the cases in which the question has been raised since the second edition appeared, with a single exception, it has uniformly been held that, in the absence of specific requirement to that effect, no formal notice is requisite.<sup>8</sup>

<sup>1</sup> *Clemens v. Luce*, 101 Cal. 432 (1894); s. c. 35 Pac. Rep. 1032; *Hewitt v. Dean*, 91 Cal. 5, 617 (1891); s. c. 25 Pac. Rep. 753; See: *Ante*, § 35.

<sup>2</sup> *Brown v. McKay*, 151 Ill. 315 (1894); s. c. 37 N. E. Rep. 1037, aff'g 51 Ill. App. 295; See: *Post*, § 45.

<sup>3</sup> *Hewitt v. Dean*, 91 Cal. 5, 617 (1894); s. c. 27 Pac. Rep. 423.

<sup>4</sup> *Fletcher v. Dennison*, 101 Cal. 292 (1894); s. c. 35 Pac. Rep. 868.

<sup>5</sup> *Atkinson v. Walton*, 162 Pa. St. 219 (1894); s. c. 29 Atl. Rep. 828, 34 W. N. C. 562.

<sup>6</sup> *Fletcher v. Dennison*, 101 Cal. 292 (1894); s. c. 35 Pac. Rep. 868; *Atkinson v. Walton*, 162 Pa. St. 219 (1894); s. c. 29 Atl. Rep. 893; 34 W. N. C. 562.

<sup>7</sup> In 1889.

<sup>8</sup> See: *Sichler v. Look*, 93 Cal. 600 (1892); s. c. 29 Pac. Rep. 220, 223;

IN CALIFORNIA the supreme court say, that a mortgagee need not, before bringing suit to foreclose the mortgage, give the mortgagor or one claiming under him notice of his election, under the terms of the mortgage, to consider the whole debt due.<sup>1</sup>

IN DAKOTA it is held that no notice other than the notice of sale under the power contained in a mortgage need be given the mortgagor of the election of the mortgagee to exercise his option, given by the mortgage, to declare the whole amount due for default in payment of an installment.<sup>2</sup>

IN ILLINOIS no particular act or form is necessary to the exercise of an option contained in a mortgage to declare the entire debt due on default, but bringing the suit is sufficient.<sup>3</sup> And it is said that a written notice by the holder of a note secured by a trust deed, calling upon the trustee to foreclose the deed because of a default in the payment of the principal debt, is a sufficient declaration of an option to declare the entire debt due, although not so stating in express words.<sup>4</sup>

IN MISSISSIPPI the supreme court hold that a formal declaration by a mortgagee, that the whole debt is due upon default in the payment of interest is unnecessary where the action taken clearly indicates the intention to declare such debt due.<sup>5</sup>

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Hewitt v. Dean, 91 Cal. 5, 617 (1891); s. c. 27 Pac. Rep. 423; Hodgdon v. Davis, 6 Dak. 21 (1887); s. c. 50 N. W. Rep. 478; Heffron v. Gage, 149 Ill. 182 (1894); s. c. 36 N. E. Rep. 569; Owen v. Occidental Bldg. & L. Assoc., 55 Ill. App. 347 (1894); Dunton v. Sharpe, 70 Miss. 850 (1893); s. c. 12 So. Rep. 800; New York Security & T. Co. v. Saratoga Gas & E. L. Co., 88 Hun (N. Y.) 569 (1895); s. c. 34 N. Y. Supp. 890; Chase v. Cleburne First Nat. Bank, 1 Tex. Civ. App. 595 (1892); s. c. 20 S. W. Rep. 1027.

<sup>1</sup> Sichler v. Look, 93 Cal. 600 (1892); s. c. 29 Pac. Rep. 220, 223; Hewitt v. Dean, 91 Cal. 5, 817, (1891); s. c. 27 Pac. Rep. 423.

<sup>2</sup> Hodgdon v. Davis, 6 Dak. 21 (1887); s. c. 50 N. W. Rep. 478.

<sup>3</sup> Owen v. Occidental Bldg. & L. Assoc. 55 Ill. App. 347 (1894).

<sup>4</sup> Heffron v. Gage, 149 Ill. 182 (1894); s. c. 36 N. E. Rep. 569.

<sup>5</sup> Dunton v. Sharpe, 70 Miss. 850 (1893); s. c. 12 So. Rep. 800.

IN NEW YORK the commencement of an action is regarded as a sufficient declaration of the intention of a trustee under a mortgage to exercise an option provided for therein to declare the entire debt due upon default in payment of interest.<sup>1</sup>

IN PENNSYLVANIA notice is thought not to be required. In the recent case of *Atkinson v. Walton*,<sup>2</sup> the court say that a *scire facias* issued to enforce collection of the whole of a mortgage upon default in payment of an installment of interest, under a provision therein that in case of any default in the payment of interest for the space of thirty days the whole shall become due at the option of the mortgagee, is not a proceeding to enforce a forfeiture, but is one to collect money according to express conditions of a contract and notice to the mortgagors is not required.

IN TEXAS the civil court of appeal say that no formal declaration of an option to treat the principal debt as due upon default is necessary before a trustee can sell under a trust deed authorizing him, upon request after default, to treat the principal debt as due and to advertise and sell the property included in the trust deed.<sup>3</sup>

§ 45a. Same—Service of notice.—In those cases where the terms of the instrument or a statute requires that there shall be given a notice of the exercise of the option to treat the whole debt as due upon a default, if the mortgagor is absent from his residence and place of business, and the mortgagee, after diligent search and inquiry, is unable to ascertain his whereabouts, a notification by the mortgagee to the mortgagor of his election to consider the mortgage debt to have become due on account of the failure of the mortgagor to pay interest as it accrued is sufficiently given by leaving notices at such places.<sup>4</sup>

<sup>1</sup> *New York Security & T. Co. v. Saratoga Gas & E. L. Co.*, 88 Hun (N. Y.) 569 (1895); s. c. 34 N. Y. Supp. 890.

<sup>2</sup> 162 Pa. St. 219 (1894); s. c. 29 Atl. Rep. 898; 34 W. N. C. 562.

<sup>3</sup> *Chase v. Cleburne First Nat. Bank*, 1 Tex. Civ. App. 595 (1892); s. c. 20 S. W. Rep. 1027.

<sup>4</sup> *Monroe v. Fohl*, 72 Cal. 568 (1887); s. c. 14 Pac. Rep. 514.



§ 46. Who may exercise option to declare debt due.—The mortgagee, or holder of a mortgage, may exercise the option to declare the whole debt due upon the happening of a specified default, and where the mortgage secures various notes or bonds the holder of a majority thereof may exercise the option. Thus, the supreme court of Connecticut say, in the case of *Gates v. Boston and New York Air Line Railway Company*,<sup>1</sup> that where a mortgage is given to secure coupon bonds, and contains a provision that they may be considered due by any bondholder on default of interest for six months and the mortgage might be then foreclosed, it was held that each bondholder took his bond subject to this right of his co-bondholders, and could not, by electing not to have his bond come due, obstruct the action of the majority.

The supreme court of Michigan say that the assignee of a decree of foreclosure of a mortgage, the whole amount not being due, has the same rights as the original complainant in the action as to exercising an option to declare the whole amount due upon a subsequent partial default.<sup>2</sup>

§ 48. Where a mortgagee holds one mortgage securing several notes.—The general rule is that where a deed of trust secures several debts to the same person, with different sureties thereon, such debts stand equal as liens, and are to be paid *pro rata* out of the property conveyed, if still owned by the original creditor and the rights of assignees are not involved.<sup>3</sup>

The United States circuit court for the eastern district of Missouri say, in the case of *Black v. Reno*,<sup>4</sup> that a mortgage to secure two notes, one payable in five and the other in ten years, with annual interest, and specifically requiring the maker to pay such notes and all interest that may be due thereon according to their tenor and effect, may be foreclosed, at the maturity of the first note, for the amount

<sup>1</sup> 53 Conn. 333 (1885); s.c. 5 Atl. Rep. 695; 1 N. Eng. Rep. 464.

<sup>2</sup> *Brand v. Smith*, 99 Mich. 395 (1894); s. c. 58 N. W. Rep. 363.

<sup>3</sup> *Farmers' Bank of Phillipi v. Woodford*, 34 W. Va. 480 (1890); s.c. 12 S. E. Rep. 544.

<sup>4</sup> 59 Fed. Rep. 917 (1894).

of the debt due, and a sale had of so much of the mortgaged premises as will satisfy such amount, the decree standing as security for the remaining installments as they become due; or, if the property is not susceptible of division, it may be sold as a whole, and the surplus returned into court and applied to the liquidation of the deferred installment or installments, with a just rebate of interest, although the mortgage contains no provision for foreclosure upon the falling due of one installment.

In Louisiana, however, it is held that a mortgagee who brings a foreclosure under a stipulation in the mortgage that if any one of several notes secured thereby shall not be paid at maturity all the remaining notes shall at once become due at his option, must remit all the capitalized and unearned interest at the date of the mortgagor's default.<sup>1</sup>

§ 49. Where mortgagee holds more than one mortgage on the same property securing different debts.—In Indiana a person holding a mortgage upon a house and lot as secondary security, after the exhaustion of other property held as primary security, forfeit their lien against the house and lot by permitting the foreclosure by default against them of a mortgage upon the primary security, which was in fact subordinate to their lien thereon.<sup>2</sup> In Pennsylvania it is held that a creditor who holds a first and second mortgage of the same land, and also collateral security for the payment of the first mortgage debt, must apply the proceeds of foreclosure under the first mortgage to payment of the first mortgage debt, and, if that debt is thereby paid, must surrender the collateral to a subsequent pledgee thereof.<sup>3</sup> In South Carolina, where a mortgagee of land, to secure a note with surety, took another mortgage to secure this note and another, and the last was first foreclosed, the proceeds must be applied to both notes.<sup>4</sup>

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<sup>1</sup> Williams' heirs v. Douglass, 47 La. An. 1277 (1895); s. c. 17 So. Rep. 805.

<sup>2</sup> O'Brien v Moffit, 133 Ind. 660 (1892); s. c. 33 N. E. Rep. 616.

<sup>3</sup> Pennsylvania Ins. Co.'s App., 109 Pa. St. 489 (1885); s. c. 1 Atl. Rep. 82; 5 Cent. Rep. 257.

<sup>4</sup> Graham v. Jones, 24 S. C. 241.



§ 50. Indemnity mortgages—Default.—An indemnity mortgage, like any other mortgage, is not in default until after a breach of the condition. When a mortgage is clearly intended to secure the payment of all debts contracted in the erection of a building, it is not necessary, to constitute a default in the condition for the payment of such debts, that the demands should have been adjudged liens, and that claims for liens should have been filed, or that plaintiff should have paid them.<sup>1</sup> But it has been said that in a case where the payment of a mortgage is conditioned upon the successful prosecution and termination of a pending suit by the mortgagor for the mortgagor, his failure to so prosecute prevents a recovery on foreclosure.<sup>2</sup> And, where a mortgage is given to indemnify a surety on a bail bond, an action to foreclose cannot be maintained upon a mere default of the principal to appear as required by the bond, if the surety has not paid any portion of the amount named therein, although the bond accompanying the mortgage provides that it shall become due on the failure of the party bailed to appear.<sup>3</sup> The supreme court of South Carolina, in the case of *Beasley v. Newell*,<sup>4</sup> say that a mortgage by a trustee to his sureties in the form of an ordinary indemnity mortgage, in express terms declared to be given for the purpose of insuring such sureties from any loss which they may sustain on account of being security on the bond of such trustee, is not converted into a mere special agreement to repay the sureties any money which they may have been required to pay for the mortgagor, so as to prevent its foreclosure before actual payment by the sureties, by a clause providing that in the event that the sureties should be injured by being security. If the premises can be sold for more than the amount which they may have paid for the principal they shall sell and dispose of the premises, return-

<sup>1</sup> *Houston v. Nord*, 39 Minn. 490 (1888); s. c. 40 N. W. Rep. 568.

<sup>2</sup> *Lamb v. Scullen*, 61 Mich. 280 (1886); s. c. 28 N. W. Rep. 99.

<sup>3</sup> *Maloney v. Nelson*, 144 N. Y. 182; s. c. 39 N. E. Rep. 82; 63 N. Y. S. R. 86.

<sup>4</sup> 40 S. C. 16 (1893); s. c. 18 S. E. Rep. 224.

ing the overplus to the mortgagor; but such clause is merely to provide for the payment of any surplus to the mortgagor.

§ 50a. Same—Foreclosure of.—Mortgages given for the purpose of indemnifying the mortgagee and securing him against loss, or breach, may be foreclosed the same as any other mortgage<sup>1</sup> either by action<sup>2</sup> or by advertisement.<sup>3</sup> The supreme court of Alabama have said that a bill to foreclose a mortgage given to the sureties on the bond of an administrator to indemnify them against liability for funds of the estate loaned by the latter, may properly be brought in equity by the heirs of the estate, where they are also made beneficiaries by its terms.<sup>4</sup> The court of appeals of New York say, in the case of *Lewis v. Deam*,<sup>5</sup> that the amount secured by a mortgage given to indemnify the mortgagee for future advances to pay off existing judgments against the mortgagor, the exact amount of indebtedness not being at the time known, although ascertainable by computation, the judgments being for settled and ascertained amounts, is not unliquidated so as to make it necessary to ascertain such amount as a condition precedent to the foreclosure of the mortgage. And the supreme court of the same state, in the recent case of *Lattimer v. Buxton*,<sup>6</sup> apply the same principle. In that case the secretary of a savings institution, individually and in connivance and conspiracy with other officers and employes of the bank, embezzled its funds. Upon the discovery of the deficiency and before the amount thereof had been ascertained, the

<sup>1</sup> See: *Smith v. Smith* (Ala. 1895), 17 So. Rep. 680; *Lee v. Fox*, 113 Ind. 98 (1888); s. c. 14 N. E. Rep. 889; *Munson v. Ensor*, 94 Mo. 504 (1888); s. c. 7 S. W. Rep. 108; 13 West. Rep. 239; *Maloney v. Nelson*, 144 N. Y. 182 (1894); s. c. 39 N. E. Rep. 82; 63 N. Y. S. R. 86; *Lewis v. Duane*, 141 N. Y. 302 (1894); s. c. 36 N. E. Rep. 322; 57 N. Y. S. R. 410.

As to what mortgages may be foreclosed; See: *Post*, § 256.

<sup>2</sup> *Id.*

<sup>3</sup> See: *Lewis v. Duane*, 141 N. Y. 302 (1894); s. c. 36 N. E. Rep. 322; 57 N. Y. S. R. 410.

<sup>4</sup> *Smith v. Smith* (Ala. 1895), 17 So. Rep. 680.

<sup>5</sup> 141 N. Y. 302 (1894); s. c. 36 N. E. Rep. 322; 57 N. Y. S. R. 410.

<sup>6</sup> 15 N. Y. Law Journal, p. 664 (1896).

said secretary executed an agreement secured by a mortgage upon real estate owned by him, by which he obligated himself to pay whatever "indebtedness" might be found due by him to the bank, "which indebtedness, if any, was created under circumstances not herein set forth but which may be shown if this agreement is ever sued upon in a court of law or equity." The court held, upon general principles of law, that the secretary was liable for the entire amount of the deficiency, and that the mortgage was enforceable for such amount. Also, that it was understood and intended by the parties that the mortgagor should be held liable for all losses sustained by the bank which were caused directly or indirectly by means of his and his associates' felonious acts. Judge Smyth, speaking for the court, says: "The position occupied by the defendant Buxton in the bank was one of extreme trust and confidence, on assuming which he bound himself by oath to subserve the best interests of the institution and guard its funds as a sacred trust. He exercised a supervision over the other employes of the bank, and whatever was done by them towards creating the defalcation, was done with his assent and knowledge, and no effort was made by him, although it was within his power to do so, to protect the bank and its funds, or even to notify the trustees of the felonious acts of his associates.

"In *Commercial Bank v. Ten Eyck*<sup>1</sup> the court said: 'The defendant, as cashier, was a financial agent of the plaintiff, intrusted to some extent with the management of its affairs. As such agent he was bound to exercise reasonable skill and ordinary care and diligence in the discharge of his duties. If he failed in such skill or omitted such care or diligence, and in consequence thereof the plaintiff suffered damage, he is liable to respond; and much more he is liable to respond if he causes any damage to the plaintiff by any illegal, fraudulent or tortuous act.'"

This rule grows out of the duty which every agent owes his principal, to exercise ordinary diligence in the protec-

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<sup>1</sup> 48 N. Y. 305, 307 (1872); See: 17 Alb. L. J. 340, 342.

tion of the interest of his principal—such diligence as a prudent man under the circumstances would display about his own affairs—and is supported by many authorities.<sup>1</sup> In the case of *Hobert v. Devell*,<sup>2</sup> the action was to compel the receiver of a bank to account for the rents and profits of certain property which had been conveyed to the bank. It was admitted that the conveyances were for security only, and it was proved that they had been executed under the following circumstances: The son of the defendant had been a teller of a bank. He had permitted the cashier to embezzle moneys of the bank, and made under his directions certain entries which covered up the shortage. On the discovery of the shortage, the defendant having been informed of the fact, and of her son's claim that he had taken none of the money, conveyed the property as security for any deficiency that might be against him. The contention was that this covered only such sums as he might personally have taken, and if he had taken nothing, then she was entitled to a reconveyance and an accounting of the rents and profits. The court held as follows: "Our conclusion is that it was designed to indemnify the bank, and not only for sums abstracted by Devell himself, but also for all of the deficiency for which he was civilly responsible. \* \* \* The testimony hitherto produced indicates that the deficiency arose in whole, or in great part, from the embezzlement, by the cashier of moneys in the hands of Devell, the teller. Some of the cashier's transactions were of such a nature that it is difficult to believe that the teller was not apprised of their dishonest or unauthorized character, yet, nevertheless, he lent himself to their furtherance by actually delivering to the cashier the money which he asked for, and concealed the facts beneath false statements in his accounts. For knowingly assisting in such abstraction, the teller would be as responsible to the bank as if he

<sup>1</sup> Among which may be cited: *Hobert v. Devell*, 38 N. J. Eq. (11 Stew.) 553 (1884); *Hun v. Cary*, 82 N. Y. 65 (1880); *Rochester City Bank v. Elwood*, 21 N. Y. 88 (1860);

*Austin v. Daniels*, 4 Den. (N. Y.) 299 (1847); *Scott v. Dempsey*, 1 Edw. Ch. (N. Y.) 514, 515 (1832).

<sup>2</sup> 38 N. J. Eq. (11 Stew.) 553 (1884).

had spent the money himself. He was an officer of the bank, having certain prescribed duties, for the faithful performance of which he was bound directly to the corporation. No orders of the cashier could exculpate him in the breach of those obligations. Within the scope of the cashier's authority, and so long as he was apparently acting on behalf of the corporation, the cashier's directions might control the teller, and the latter might not be required to look beneath the surface of his superior's acts. But when he was led to believe that the cashier was violating his own duty to the bank, and was taking the bank's funds for his own ends, irregularly, and without authority from the directors, the teller had no more right to aid or connive at such misappropriation than if it were being perpetrated by a stranger. The same principle would hold if the embezzler were a director or the president. Such misconduct on the part of Devell we think the evidence tends to establish in more than one instance; and so far as it helped to effect a loss to the bank he is answerable.

"In respect to the point which has been urged on behalf of the defendant as to the construction to be given to the agreement in question, and to the use of the words 'indebted' and 'indebtedness' as limiting the defendant's liability to such sums as he himself feloniously abstracted from the bank, it is sufficient to say, in addition to what has been said upon the subject, that the testimony as to the surrounding circumstances and conversations which lead up to the execution of the agreement was competent to explain the sense in which the term 'indebtedness' was used.<sup>1</sup>

"In the case of *White's Bank of Buffalo v. Miles*,<sup>2</sup> evidence of surrounding circumstances was admitted, and in the case of *French v. Carhart*,<sup>3</sup> the court say: 'Too much regard is not to be had to the proper and exact signification of words and sentences, so as to prevent the simple intent of the parties from taking effect, and whenever the language

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<sup>1</sup> *Blossom v. Griffin*, 13 N. Y. 569 (1856); *White's Bank of Buffalo v. Miles*, 73 N. Y. 335 (1878).

<sup>2</sup> 73 N. Y. 335 (1878).

<sup>3</sup> 1 N. Y. 96 (1847).



used is susceptible of more than one interpretation, the court will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties and of the subject matter of the instrument. To this extent, at least, the well settled rule is that extraneous evidence is admissible to aid in the construction of a written contract.' "

In the case of *Munson v. Ensor*,<sup>1</sup> the plaintiff executed a trust deed to secure his recognizors, and upon forfeiture and sale of the property one surety purchased it in trust for the others, and conveyed by a quit-claim deed to a *bona fide* purchaser, in an action by the plaintiff to set it aside, a writing given him by the sureties, never recorded, agreeing that a sale under the trust deed should be made only after they had sustained loss, was held to be ineffectual as to the purchaser.

The supreme court of Indiana, in the case of *Lee v. Fox*,<sup>2</sup> say that in a suit to foreclose a mortgage taken by a surety as indemnity, an answer that, contemporaneously with the mortgage, the defendant executed a chattel mortgage of two threshing machines to the plaintiff, one of which the latter had sold, becoming the purchaser and retaining possession thereof, does not constitute a defense.

§ 53. **Extension of time of payment.**—The supreme court of Indiana, in the case of *Ayers v. Hamilton*,<sup>3</sup> say that an agreement to extend the time of payment of a note secured by mortgage is no bar to a foreclosure of the mortgage within that time, the only remedy for a violation of the contract being an action for damages, and it is maintained by the supreme court of Nebraska that where a mortgage has been extended by a new agreement, until the extended period has expired, there can be no right of foreclosure, unless by virtue of some default occurring subsequent to the agreement for extension.<sup>4</sup>

<sup>1</sup> 94 Mo. 504 (1887); s. c. 7 S. W. Rep. 108; 13 West. Rep. 239.

<sup>2</sup> 113 Ind. 98 (1887); s. c. 14 N. E. Rep. 889; 12 West. Rep. 677.

<sup>3</sup> 131 Ind. 98 (1887); s. c. 30 N. E. Rep. 895.

<sup>4</sup> *Eby v. Ryan*, 22 Neb. 470 (1887); s. c. 35 N. W. Rep. 225.

## CHAPTER IV.

### WHEN RIGHT OF ACTION BARRED.

§ 55	Limitation of foreclosure actions.	§ 62	When foreclosure of mortgage barred.
58	Presumption of payment from mortgagor's possessions.	63	Foreclosure of mortgage when note barred.
61	When a limitation begins to run against a mortgage.		

§ 55. **Limitation of foreclosure actions.**—In North Carolina, an action to foreclose a mortgage, where no part of the mortgaged debt has been paid, and the mortgagor remains in possession; is barred in ten years from the forfeiture; and the same rule applies where the mortgagor died before the time expired, and the action is brought against his heirs.<sup>1</sup> The provision of the South Carolina code<sup>2</sup> only bars an action to foreclose the mortgage, and does not bar an action to recover the debt secured by the mortgage.<sup>3</sup> But it is held in California that where a claim founded upon a note secured by a mortgage that has been duly presented to the personal representative of a deceased mortgagor, and allowed and approved, the right of the mortgagee to maintain an action to foreclose the mortgage is not affected by the statute of limitations, pending the proceedings for the settlement of the estate of the mortgagor.<sup>4</sup>

§ 58. **Presumption of payment from mortgagor's possession.**—The mortgagor may hold possession of the mortgaged premises so long as to raise a presumption that he has paid the debt. Thus, possession of the mortgaged premises by the mortgagor and those claiming under him for more than twenty years after the maturity of the mortgage debt, without recognition of the mortgage, or of the debt is presumptive proof of payment, which, in the absence of evidence to control it, will defeat an action to foreclose

<sup>1</sup> *Fraser v. Bean*, 96 N. C. 327 (1887); s. c. 2 S. E. Rep. 159.

<sup>2</sup> S. C. Code §§ 152, 153.

<sup>3</sup> See: *Fraser v. Bean*, 96 N. C. 327 (1887); s. c. 2 S. E. Rep. 159.

<sup>4</sup> *German Sav. & L. Soc. v. Hutchinson*, 68 Cal. 52 (1885); s. c. 8 Pac. Rep. 627.



the mortgage;<sup>1</sup> because in such a case the presumption of law is that the mortgage has been discharged by payment or otherwise.<sup>2</sup> But presumptions of payment founded on the lapse of time are matters of evidence, and not in most cases, *proprio jure*, matters of plea in bar.<sup>3</sup>

§ 61. When limitation begins to run against a mortgage.—The supreme court of Pennsylvania, in the case of *Tankin v. Baum*,<sup>4</sup> say that, upon conditional promise to pay a mortgage debt upon the happening of a certain event, the statute of limitations will not begin to run until the happening of the event.

§ 62. When foreclosure of mortgage barred.—It is held by the supreme court of Illinois, in the case of *McMillan v. McCormick*,<sup>5</sup> that the statute of limitations which bars the debt, which is the principal, can alone bar the mortgage, which is the incident. In the course of the opinion the court say: "In *Harris v. Mills*,<sup>6</sup> it was held, in a proceeding to foreclose a mortgage, that where the note, for the security of which the mortgage is given, is barred by the statute of limitations, so that

<sup>1</sup> *Kellogg v. Dickinson*, 147 Mass. 432 (1888); s. c. 18 N. E. Rep. 223; 1 L. R. A. 346; See: *Van Vleet v. Blackwood*, 39 Mich. 728, 733 (1878); *Peck v. Mallams*, 10 N. Y. 509, 543 (1853); *Bailey v. Jackson*, 16 John. (N. Y.) 210, 214 (1819); *Jackson ex d. People v. Pierce*, 10 John. (N. Y.) 414 (1853); *Collins v. Torry*, 7 John. (N. Y.) 278 (1810); *Jackson ex d. v. Hudson* 3 John. (N. Y.) 325 (1808); *Giles v. Baremore*, 5 John. Ch. (N. Y.) 565 (1821); *Dunham v. Minard*, 4 Paige Ch. (N. Y.) 441 (1834); *Miller v. Smith*, 16 Wend. (N. Y.) 425, 436 (1826); *Almy v. Wilbur*, 2 Woodb. & M. 403; *Hallary v. Waller*, 12 Ves. 239 (1806).

<sup>2</sup> See: *Howland v. Shurtleff*, 43 Mass. (2 Met.) 26, 28 (1840); s. c. 85 Am. Dec. 386; *Van Vleet v. Blackwood*, 39 Mich. 733 (1878); *Jackson*

*ex d. People v. Wood*, 12 John. (N. Y.) 242 (1815); *Collins v. Torry*, 7 John. (N. Y.) 278 (1810); *Jackson ex d. Klock v. Hudson*, 3 John. (N. Y.) 375 (1808); s. c. 7 *Id.* 278; *Dunham v. Mainard*, 4 Paige Ch. (N. Y.) 441 (1834); *Hillary v. Waller*, 12 Ves. 239 (1806).

<sup>3</sup> See: *Malloy v. Vanderbilt*, 4 Abb. (N. Y.) N. C. 127, 133 (1877); *Giles v. Baremore*, 5 John. Ch. (N. Y.) 545 (1821); *Livingston v. Livingston*, 4 John. Ch. (N. Y.) 287 (1820); *Carter v. Wolfe*, 1 Heisk. (Tenn.) 694, 702 (1870); *Robertson v. Campbell*, 2 Call (Va.) 421 (1800); *Ritzer v. Burns*, 7 W. Va. 63, 72 (1873).

<sup>4</sup> 114 Pa. St. 414 (1886); s. c. 7 Atl. Rep. 185; 5 Cent. Rep. 748.

<sup>5</sup> 117 Ill. 79 (1886); s. c. 7 N. E. Rep. 132; 4 West. Rep. 210, 212.

<sup>6</sup> 28 Ill. 44 (1864).

when the note for the security of which the mortgage is given is barred by the statute of limitations, so that there could be no recovery thereon in an action at law, the right to foreclose is also barred,<sup>1</sup> and this was said to be because it is held that the debt is the principal thing and the mortgage is but the incident; the consideration which supports the note supports the mortgage; an assignment of the note operates, *ipso facto*, to transfer the mortgage; and a payment, release, or other discharge of a note, satisfies and releases the mortgage.

"In *Pollock v. Watson*,<sup>2</sup> ejectment was brought by the grantee of the mortgagee against the heirs at law of the mortgagor; and it was held that the debt secured by the mortgage being barred, there could be no recovery. The court, among other things, said: 'The notes were barred by the statute at the expiration of sixteen years after their maturity, and the bar to the debt having become complete, plaintiff in error had a right to interpose that bar to prevent a recovery in ejectment.'

"Of course the ejectment was not a suit for foreclosure, but it was a legal mode for enforcing rights of the mortgagee under the mortgage; and if the mortgage was not barred at law, the mortgagee was entitled to recover. The case shows that the statute of limitations of sixteen years was held a good defense, in an action at law on a mortgage given to secure the payment of a promissory note.

"In *Medley v. Elliott*,<sup>3</sup> the above cases were cited with approval, and in discussing what period of limitation applied in that case, it was said, after quoting from Chancellor Kent's opinion in *Jackson ex dem Horton v. Willard*,<sup>4</sup> that, until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt, and in reason and propriety it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned the assignee must

<sup>1</sup> Compare: *Post*, § 63.

<sup>2</sup> 41 Ill. 516 (1866).

<sup>3</sup> 62 Ill. 532 (1872).

<sup>4</sup> 4 John. (N. Y.) 41 (1809).

hold the interest at the will and disposal of the creditor who holds the bonds. It was added: 'It naturally follows that the statute of limitations which bars the debt, the principal, can alone bar the mortgage, the incident.'"

The supreme court of California say that under the laws of that state an action to foreclose a mortgage given by a decedent to secure a note can be maintained, although the claim has been presented to and allowed by the personal representatives; and the debt will not become barred pending administration.<sup>1</sup> And it is well settled that a foreclosure of a part of mortgaged lands, to satisfy one of several notes secured by mortgage maturing, at different

<sup>1</sup> *Moran v. Gardemeyer*, 82 Cal. 96 (1889); s. c. 23 Pac. Rep. 6.

**California Code of Civil Procedure, §§ 1497, 1500.**—The California Code of Civil Procedure, § 1497, provides for the filing and allowance of claims against decedent's estate; and § 1500 provides that "no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint.

In *Moran v. Gardemeyer*, above cited, the defendant contended that the plaintiff was not entitled to maintain an action to foreclose, for the reason that he had already presented his claim against the estate for the amount of the indebtedness represented by the note and interest, and the same had been allowed and approved, and stood as an admitted claim against the estate, to be paid in due course of administration, and he, therefore, no longer had a right to proceed for the collection of the same by foreclosure and to sub-

ject the estate to the cost and counsel fees in foreclosure. It was contended that having filed his claim under § 1497, of the Code of Civil Procedure, under the present condition of the statutes, the plaintiff was, therefore, barred of the right to foreclose, unless such right was given by § 1500, and that under that section the right was conferred only where the holder of the mortgage declines to file his claim under § 1497 and elects to look to the land rather than the estate. The Court say: "We cannot concede, as counsel contend, that this is now an open question in this court. The point made was directly decided against the position taken by the appellant here, in *Hibernian Savings & Loan Soc. v. Conlin*, 67 Cal. 180; s. c. 7 Pac. Rep. 477, and that case was followed by *German Savings & Loan Soc. v. Hutchinson*, 68 Cal. 52; s. c. 8 Pac. Rep. 627, and *Wise v. Williams*, 72 Cal. 544; s. c. 14 Pac. Rep. 204, both of which were cases of foreclosure after presentation and allowance of the claim, and where, but for the presentation and allowance of the claim, the debt would have been barred by the statute of limitations, and the mortgage extinguished."

dates, is no bar to a subsequent foreclosure of the rest of the lands to satisfy the balance of such note and to pay other notes maturing at later dates.<sup>1</sup>

§ 63. Foreclosure of mortgage when note barred.— In some states, as in Illinois,<sup>2</sup> a statute of limitations which bars recovery on the note bars a foreclosure of the mortgage securing the note; in other states a mortgage may be foreclosed though the statute of limitations has run against the note secured by it.<sup>3</sup> In the latter states a transfer of two of several mortgage notes of different dates, with an agreement by the mortgagee to hold the mortgage in trust to secure the two notes, will sustain a writ of entry to foreclose the mortgage against a tenant of the mortgagor holding under an instrument containing a reference to a mortgage as outstanding, which the court finds to be the mortgage in suit, although the mortgage and remaining notes had been assigned with notice of the agreement, and the other notes thereafter paid, and upon such payment the mortgage transferred to demandant; the notes, but not the mortgage, being barred by the statute of limitations.<sup>4</sup>

<sup>1</sup> Bressler v. Martin, 133 Ill. 278 (1890); s. c. 24 N. E. Rep. 518.

<sup>2</sup> McMillan v. McCormick, 117 Ill. 79 (1886); s. c. 7 N. E. Rep. 132; 4 West Rep. 210. See: *Ante*, § 62.

**Illinois Statutes of Limitations** is prospective only in its operation, and § 11 (2 Starr v. C. Stats, c. 83, ¶ 11) does not apply to mortgages previously executed and delivered. See: McMillan v. McCormick, 117 Ill. 79; s. c. 7 N. E. Rep. 132; Means v. Harrison, 114 Ill. 248; s. c. 2 N. E. Rep. 64; Dobbins v. National Bank, 112 Ill. 553; Dickson v. Chicago, B. & Q. R. Co., 77 Ill. 331; Thompson v. Alexander, 11 Ill. 55.

This construction of the statute is in accordance with the well established

rules that a statute is to operate *in futuro* only, and is not to be so construed as to affect past transactions. See: Means v. Harrison, 114 Ill. 248; s. c. 2 N. E. Rep. 64.

<sup>3</sup> Norton v. Palmer, 142 Mass. 433 (1886); s. c. 8 N. E. Rep. 346; 3 N. Eng. Rep. 120; Cerney v. Pawlot, 66 Wis. 262 (1886); s. c. 28 N. W. Rep. 183. See: Hannan v. Hannan, 123 Mass. 441, 442 (1877); Hancock v. Franklin Ins. Co., 114 Mass. 155, 156 (1873); Thayer v. Mann, 36 Mass. (19, Pick.) 535 (1837). Also, 4 Cent. L. J. 412.

<sup>4</sup> Norton v. Palmer, 142 Mass. 433 (1886); s. c. 8 N. E. Rep. 346; 3 N. Eng. Rep. 120.

## CHAPTER V.

### PARTIES PLAINTIFF.

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| <p>§ 69. Introductory.</p> <p>70. Parties generally in equitable foreclosures.</p> <p>74. Assignor of mortgage cannot foreclose.</p> <p>75. Assignee, sole owner, may foreclose.</p> <p>77. When assignor and assignee should or should not both be parties.</p> <p>80. Partners—Any one or more may foreclose.</p> <p>84. Owner of one of several notes secured by a mortgage may foreclose.</p> <p>90. Owner of equitable interest of any kind in the mortgage may generally foreclose.</p> <p>93. Assignee of the note, bond or debt may foreclose, though the mortgage is not assigned.</p> <p>93a. Same — Inpeaching assignment.</p> | <p>§103. Owner of mortgage dying—<br/>Personal representative may foreclose.</p> <p>103a. Same—Death of mortgagee pending foreclosure.</p> <p>103b. Same—In case of partnership.</p> <p>105. Owner of mortgage dying—<br/>Heirs, devisees and legatees generally cannot foreclose.</p> <p>110. Trustees may foreclose.</p> <p>110a. Same—Delegation and substitution of power.</p> <p>110b. Same—Request to foreclose.</p> <p>110c. Same—Same—Requiring stipulated percentage.</p> <p>111. Beneficiaries—When not necessary parties.</p> <p>112. Beneficiaries, <i>cestuis que trust</i>, may sometimes foreclose.</p> <p>113. Mortgages to persons in their official capacity—They or their successors may foreclose.</p> |
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§ 69. Introductory.—In a case where there are several notes or bonds secured by a mortgage made directly to the holders of such notes or bonds, all the holders should be made parties to the foreclosure of the mortgage;<sup>1</sup> but where the mortgage is given to a trustee for the benefit of the holders, such holders need not be made parties to the suit to foreclose.<sup>2</sup> In the latter case, where the trustee is dead, one or more of the holders of the notes or bonds may file

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<sup>1</sup> Nashville & D. R. Co. v. Orr, 85 U. S. (18 Wall.) 471 (1873); bk. 21 L. ed. 810.  
(1085)

<sup>2</sup> Shaw v. Little Rock & Ft. S. R. Co., 100 U. S. 605 (1880); bk. 25 L. ed. 757; Vose v. Bronson, 73 U. S. (6 Wall.) 452 (1863); bk. 18 L. ed. 846.



a bill on behalf of himself or themselves and all others secured by the mortgage for the foreclosure thereof.<sup>1</sup>

§ 70. Parties generally in equitable foreclosures.—The general rule is that the only proper parties in foreclosure are the mortgagor and mortgagee, and those who have acquired rights under them subsequent to the mortgage;<sup>2</sup> and some of the cases hold that it is sufficient to have the mortgagee and the holder of the legal title parties without bringing in a grantor of such title.<sup>3</sup> It is said that in as much as a mortgagee is always a necessary party to foreclosure, an insolvent bank holding a mortgage is a necessary party to foreclosure by its receiver.<sup>4</sup> In Alabama it is held that a mortgagee, being the trustee in the mortgage, and as such the holder of the legal title, he is an indispensable party to a suit for foreclosure.<sup>5</sup> It is said by the supreme court of New York that all parties interested in a trust fund should be made parties to an action to foreclose a mortgage thereon.<sup>6</sup> And in California, under the code of civil procedure,<sup>7</sup> a trustee to whom a mortgage has been assigned as security for a debt of the mortgagee may be joined with the latter as plaintiff in an action to foreclose the mortgage; and if the trustee is not originally made a plaintiff, he may be brought in by amendment.<sup>8</sup> Yet a mortgagee is not required to make a creditor who has no lien a party to his action to enforce his mortgage lien.<sup>9</sup>

Where a person in interest seeks to be made a party to a

<sup>1</sup> *Galveston H. & H. R. Co., v. Cowdrey*, 78 U. S. (11 Wall.) 459 (1871); bk. 20 L. ed. 199. See: *Post*, § 112.

<sup>2</sup> *McComb v. Spangler*, 71 Cal. 418 (1886); s. c. 12 Pac. Rep. 347.

<sup>3</sup> *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 41 Fed. Rep. 8 (1889); s. c. 7 Ry. & Corp. L. J. 30.

<sup>4</sup> *Comer v. Bray*, 83 Ala. 217 (1888); s. c. 3 So. Rep. 554.

<sup>5</sup> *Hambrick v. Russell*, 86 Ala. 199 (1889); s. c. 5 So. Rep. 298.

<sup>6</sup> *United States Trust Co. v. Roche*, 41 Hun (N. Y.) 549 (1886), reversed on other grounds in 116 N. Y. 120.

<sup>7</sup> Cal. Code Civ. Proc., §§ 378, 385.

<sup>8</sup> *Cerf v. Ashley*, 68 Cal. 419 (1886); s. c. 9 Pac. Rep. 658.

<sup>9</sup> *McMurtry v. Montgomery Masonic Temple Co.*, 86 Ky. 206; s. c. 5 S. W. Rep. 570.



mortgage foreclosure proceeding, conditions should not be imposed on granting the application.<sup>1</sup>

§ 72. **Parties plaintiff generally.**—Those persons who are directly interested in the payment of a debt which a mortgage is given to secure may, as a general rule, maintain an action to foreclose the mortgage. But it is held that in a foreclosure by the trustee named in a mortgage given to secure bonds, the bondholders are not necessary parties; they are represented by their trustee.<sup>2</sup> In those cases, however, where the trustee refuses to foreclose, a bondholder who has applied to him to do so may bring an action for that purpose.<sup>3</sup> An administrator of the mortgagee is a proper party to commence proceedings for the foreclosure of a mortgage.<sup>4</sup> Thus it has been said that where a man made a voluntary conveyance in trust for himself, his wife, and children, and took back a mortgage as security for the performance of the trust, in a suit after his death to foreclose it, his administrator and surviving children were proper parties.<sup>5</sup> But the fact that the payee of a note upon transferring it guarantees the prompt payment of the interest coupons, and also the principal at maturity, does not constitute him the transferee's agent in such a sense as to authorize him to take any steps which the latter might take to enforce collection, such as taking possession and selling the maker's property under a mortgage with power of sale.<sup>6</sup>

The rule is well settled that on a bill in foreclosure by citizens of a state against a railroad corporation of another state, in the United States circuit court for the latter state,

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<sup>1</sup> *Lawton v. Lawton*, 54 Hun (N. Y.) 415 (1889); s. c. 7 N. Y. Supp. 556; 27 N. Y. S. R. 302.

<sup>2</sup> *Richter v. Jerome*, 123 U. S. 233 (1887); bk. 31 L. ed. 132.

<sup>3</sup> *Davies v. New York Concert Co.*, 41 Hun (N. Y.) 492 (1886).

<sup>4</sup> *Plummer v. Doughty*, 78 Me. 341

(1886); s. c. 5 Atl. Rep. 526; 2 N. Eng. Rep. 695.

<sup>5</sup> *Sargent v. Baldwin*, 60 Vt. 17 (1888); s. c. 13 Atl. Rep. 854; 6 N. Eng. Rep. 253.

<sup>6</sup> *Dewing v. Crueger*, 7 Wash. 590 (1894); s. c. 35 Pac. Rep. 393.

owners of the bonds who are citizens of the state where the suit is brought cannot be made co-plaintiffs.<sup>1</sup>

§ 74. Assignor of mortgage cannot foreclose.—A mortgagee who has assigned all his interest in the mortgage, and the bond or note it secures, absolutely and unconditionally, cannot maintain an action to foreclose the mortgage; consequently further proceedings on foreclosure of a mortgage after an assignment of the decree cannot be prosecuted in the name of the assignor.<sup>2</sup> And it is held by the New York supreme court that an agreement by the assignee of a mortgage, that the assignor shall bring the action for its foreclosure, in violation of the code,<sup>3</sup> providing "that every action must be prosecuted in the name of the real party in interest," does not deprive the assignee of his title to the mortgage, or entitle the assignor to the proceeds of the mortgage, if collected by him.<sup>4</sup>

§ 75. Assignee, sole owner, may foreclose.—On the assignment of a mortgage both the assignee and the mortgagee are proper parties plaintiff to an action to enforce the lien of the mortgage against land omitted therefrom by mutual mistake, and alleged to have been afterwards fraudulently conveyed by the mortgagor to his daughters, where the mortgagee represented to the assignee that the mortgage covered the premises omitted.<sup>5</sup> It has been said that the assignee of a mortgage, who holds it under an assignment as collateral security for notes, which shows on its face that his title is not absolute, must set forth in his bill of foreclosure the existence and amount of the notes secured, and must make the assignor a party.<sup>6</sup> The supreme court of Louisiana, in *Thompson v. Whitbeck*,<sup>7</sup> say that one

<sup>1</sup> *Jackson & Sharp Co. v. Burlington & L. R. Co.*, 24 Blatchf. C. C. 194 (1887); s. c. 29 Fed. Rep. 474.

<sup>2</sup> *Moore v. Smith*, 103 Mich. 387 (1894); s. c. 61 N. W. Rep. 538.

<sup>3</sup> N. Y. Code Civ. Proc. § 449.

<sup>4</sup> *Winegard v. Fanning*, 76 Hun (N. Y.) 170 (1894); s. c. 27 N. Y.

Supp. 566; 57 N. Y. S. R. 330.

<sup>5</sup> *Sprague v. Cochran*, 84 Hun (N. Y.) 240 (1895); s. c. 32 N. Y. Supp. 572; 65 N. Y. S. R. 630.

<sup>6</sup> *Cooper v. Smith*, 75 Mich. 247. (1889); s. c. 42 N. W. Rep. 815.

<sup>7</sup> 47 La. An. 49 (1895); s. c. 16 So. Rep. 570.

who has for value and in good faith taken a mortgage from one to whom a married woman has made a simulated sale of her property to serve her husband's purposes may, foreclose such mortgage in proceedings against the mortgagor under the non-alienation clause of the Louisiana statute authorizing the creditor to seize and sell the property as if it were that of his debtor, notwithstanding a subsequent judgment in favor of such married woman annulling the sale as against the mortgagor. And it has been said that the delivery, without a written assignment, of an agreement and trust deed to a third person who has paid the sum secured thereby, at the request of the grantor in the deed, constitutes such third person the equitable assignee thereof, and entitles him to maintain a bill for foreclosure.<sup>1</sup>

§ 77. **When assignor and assignee should or should not both be parties.**—It has been held that a mortgagee who has guaranteed the payment of the bond secured by the mortgage to a purchaser of the bond, and who afterwards, on account of his guarantee, takes up some of the overdue coupons attached to and evidencing the interest to be paid on such bond, is entitled to foreclose the mortgage for such past due coupons; and the owner of the bond and mortgage is not a necessary party to such action.<sup>2</sup> In a case where the plaintiff and defendant bought land, each to pay one half, and the plaintiff paid his half, and joined with the defendant in a mortgage to the grantor for the balance of the amount due by the defendant; and subsequently the plaintiff paid the debt, and the mortgage and note uncanceled and not assigned were delivered to him; the court held that the plaintiff could not maintain a bill in equity against the defendant, to which the mortgagee was not a party, praying subrogation and foreclosure.<sup>3</sup>

§ 80. **Partners—Any one or more may foreclose.**—The general rule is that any member of a partnership may

<sup>1</sup> *Stelzich v. Weidel*, 27 Ill. App. 177.

<sup>2</sup> *Burnett v. Hoffman*, 40 Neb. 569 (1894); s. c. 58 N. W. Rep. 1134.

<sup>3</sup> *Lynn v. Richardson*, 78 Me. 367 (1886); s. c. 5 Atl. Rep. 877; 2 N. Eng. Rep. 879.

bring an action to foreclose a mortgage given to secure a partnership debt; hence, on the death of a member of the partnership, the mortgage may be enforced by the survivor or survivors, as it is a mere security.<sup>1</sup>

§ 84. **Owner of one of several notes secured by a mortgage may foreclose.**—The supreme court of Tennessee, in the recent case of *Clark v. Jones*,<sup>2</sup> held that the owner of a note secured by a deed of trust may bring an action to foreclose it, although the trustee has not refused to execute the trust, or his execution thereof has not been impeded. And in a late case the supreme court of New York say that a holder of railroad bonds secured by mortgage may maintain an action to foreclose the mortgage upon default in payment of interest, where the trustees have, upon request, refused so to do.<sup>3</sup> It is thought, however, that a single bondholder has no right to a decree for his exclusive benefit on the foreclosure of a mortgage, but is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but also to see that their rights are protected in the final decree.<sup>4</sup>

§ 90. **Owner of equitable interest of any kind in the mortgage may generally foreclose.**—The prevailing rule is that anyone who has an equitable interest in a mortgage may foreclose; and where the holder of a bond applies to the trustee to whom the mortgage securing the bond is executed for the benefit of the bondholders requesting him to institute a suit to foreclose the mortgage, the refusal of the trustee to do so authorizes such holder to bring action to foreclose.<sup>5</sup>

§ 98. **Assignee of a note, bond or debt may foreclose, though the mortgage is not assigned.**—The supreme

<sup>1</sup> *Younts v. Starnes*, 42 S. C. 22 (1894); s. c. 19 S. E. Rep. 1011.

<sup>2</sup> 93 Tenn. 639 (1894); s. c. 27 S. W. Rep. 1009; 43 Am. St. Rep. 931.

<sup>3</sup> *Van Benthuyzen v. Central N. E. & W. R. Co.*, 17 N. Y. Supp. 709; 45 N. Y. S. R. 16 (1892).

<sup>4</sup> *New Orleans P. R. Co. v. Parker*, 143 U. S. 42 (1892); bk. 36 L. ed. 66; s. c. 12 Sup. Ct. Rep. 364.

<sup>5</sup> *Davies v. New York Concert Co.*, 41 Hun (N. Y.) 492 (1886).

court of Alabama have recently held that the assignee of a mortgage note, under a parol assignment, may foreclose the mortgage.<sup>1</sup> The New Hampshire supreme court, in the case of *Gove v. Gove*,<sup>2</sup> say that the holder of a negotiable note secured by mortgage in New Hampshire, deriving his title from an executor or administrator in another state, may sue in his own name upon the mortgage in New Hampshire. And it was recently held by the supreme court of Missouri that the purchaser for value before maturity of a note secured by a deed of trust, cannot be defeated of his right to enforce his security against the land, notwithstanding his knowledge of special circumstances under which the note was obtained, unless he has actual knowledge of a fraud on the part of a payee.<sup>3</sup>

§ 98a. **Same—Impeaching assignment.**—The supreme court of Alabama, in the case of *Johnson v. Beard*,<sup>4</sup> say that the validity of the assignment of a mortgage cannot be impeached by the mortgagor in a suit by the assignee to enforce it, and that in an action of ejectment by the purchaser at the mortgage sale, it is proper to exclude evidence that there was no consideration for such an assignment.<sup>5</sup>

§ 103. **Owner of mortgage dying—Personal representative may foreclose.**—Where the owner of a mortgage dies before foreclosure, the action for that purpose may be brought by his personal representatives;<sup>6</sup> his heirs need

<sup>1</sup> *O'Neal v. Seixas*, 85 Ala. 80 (1888); s. c. 4 So. Rep. 745.

<sup>2</sup> 64 N. H. 503 (1888); s. c. 15 Atl. Rep. 121; 6 N. Eng. Rep. 819.

<sup>3</sup> *Jennings v. Todd*, 118 Mo. 296 (1893); s. c. 24 S. W. Rep. 148.

<sup>4</sup> 93 Ala. 96 (1891); s. c. 9 So. Rep. 535.

<sup>5</sup> In the course of the opinion Judge Coleman says: "Code, § 1844, which provides that the assignee of a mortgage, in which is given the grantee the power to sell, may execute the mortgage, notwithstanding the assignment may not contain apt words to

convey the legal title, has been so often construed by this court we deem it unnecessary to more than simply cite some of the cases." The judge then cites *Martinez v. Lindsay*, 91 Ala. 334 (1890); s. c. 8 So. Rep. 787. *Wildsmith v. Tracy*, 80 Ala. 258, 263 (1885); *Buell v. Underwood*, 65 Ala. 285 (1880); *McGuire v. Van Pelt*, 55 Ala. 344 (1876).

<sup>6</sup> See: *O'Neal v. Seixas*, 85 Ala. 80 (1888); s. c. 4 So. Rep. 745; *Plummer v. Doughty*, 78 Me. 341 (1886); s. c. 5 Atl. Rep. 526; 2 N. Eng. Rep. 695; *Holcomb v. Richards*, 38 Minn.



not be made parties to the action.<sup>1</sup> And it is held by the supreme court of South Carolina, in the case of *Dial v. Gary*,<sup>2</sup> that where the mortgagee dies in another state, only his administrator in South Carolina can maintain suit to foreclose a mortgage on lands lying in that state. But on the other hand, it has been held in Minnesota that where a mortgage of lands in that state given to secure a debt due to the mortgagee in another state, contains a power to the mortgagee, his executors, administrators, or assigns, in case of default to sell and convey the premises, it may be exercised by the administrator appointed at the mortgagee's domicile.<sup>3</sup> Where letters of administration have been issued to two persons out of the same court, a bill to foreclose a mortgage to their testator is properly filed in their joint names.<sup>4</sup>

It has been said that where a mortgage is given to a husband, to secure a bond for the maintenance and support of the husband and his wife, and the husband dies first, the administrator of the husband may maintain a suit to foreclose the mortgage for a breach occurring after the death of the mortgagee; and it is unnecessary to show a demand made by the widow upon such administrator.<sup>5</sup> And in a case where the mortgage is conditioned for the payment of the sum secured in six annual installments, and that in case of the death of the mortgagee all unpaid balance to fall due, one-half in one year, to be paid to the mortgagee's son, and the other half in two years, to be paid to his daughter, unless the death of the mortgagee occurred at a time when some part of the balance had not yet fallen due according to the condition of the mortgage itself, the pro-

38 (1887); s. c. 35 N. W. Rep. 714; *Robinson v. Brower*, 10 N. Y. Supp. 854 (1890); s. c. 32 N. Y. S. R. 42; *Dial v. Gary*, 24 S. C. 572 (1885); *Anderson v. Watt*, 138 U. S. 694 (1891); bk. 34 L. ed. 1078; s. c. 11 Sup. Ct. Rep. 449.

<sup>1</sup> *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257 (1886); s. c. 4 N. E. Rep. 492; 2 West. Rep. 393.

<sup>2</sup> 24 S. C. 572 (1885).

<sup>3</sup> *Holcombe v. Richards*, 38 Minn. 38 (1887); s. c. 35 N. W. Rep. 714.

<sup>4</sup> *Anderson v. Watt*, 138 U. S. 694 (1891); bk. 34 L. ed. 1078; s. c. 11 Sup. Ct. Rep. 449.

<sup>5</sup> *Plummer v. Doughty*, 78 Me. 341 (1886); s. c. 5. Atl. Rep. 526; 2 N. Eng. Rep. 695



ceeds would not be payable to the son and daughter; but would pass to the mortgagee's personal representative, who should bring an action to foreclose.<sup>1</sup>

§ 103a. Same—Death of mortgagee pending foreclosure.—In those cases where the legal title is in the mortgagee, and he dies pending foreclosure, the case cannot be proceeded with until his executor is made a party and the defendant given notice,<sup>2</sup> even in those cases where the foreclosure was proceeding in the name of the mortgagee for the use of another.<sup>3</sup> Thus, in a case where, pending foreclosure, the defendant died, and his administratrix was made party by *scire facias*, and the plaintiff having died, his executrix was made a party without notice to the defendant, and judgment of foreclosure was at once rendered, the defendant not being present in person or by counsel, the court held, that she had not had her time in court, and, having a good defense, an affidavit of illegality would lie to the execution.<sup>4</sup>

§ 103b. Same—In case of partnership.—Where a mortgage is given to a partnership and one of the partners dies, the remaining partner or partners may enforce payment by foreclosure, the mortgage being a mere security for the debt.<sup>5</sup>

§ 105. Owner of mortgage dying—Heirs, devisees and legatees generally cannot foreclose.—The New York court of appeals, in the recent case of *Kraemer v. Adelsberger*,<sup>6</sup> say that a deed absolute in form, and a contemporaneous agreement that the property is to be held as security, which together constitute a mortgage, is a personal asset which passes to the executor of the mortgagee for purposes of administration; and upon a foreclosure

<sup>1</sup> *Robinson v. Brower*, 32 N. Y. S. R. 42 (1890); s. c. 10 N. Y. Supp. 854.

<sup>2</sup> *Meeks v. Johnson*, 75 Ga. 629 (1885).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Younts v. Starnes*, 42 S. C. 22 (1894); s. c. 19 S. E. Rep. 1011. See: *Ante*, § 80.

<sup>6</sup> 122 N. Y. 467 (1890); s. c. 25 N. E. Rep. 859; 34 N. Y. S. R. 24; revsg. 23 Jones & S. (55 Super. Ct. Rep.) 245.

thereof by the executor or his assignee, the heirs of the grantee are not necessary parties. And in a case where the administrators, having paid all creditors and all the expenses of administration, handed the complainants, who were sole heirs and distributees, certain mortgages which were deemed of little value and not brought to the notice of the probate court, and the heirs afterwards brought suit to foreclose the mortgages, and a demurrer to the complaint was interposed on the ground that the suit could only be brought by the personal representatives of the mortgagee, the court held that the demurrer could not be sustained.<sup>1</sup>

§ 110. **Trustees may foreclose.**—The general rule is that a trustee in a mortgage is the proper person to foreclose it,<sup>2</sup> whether he holds the legal title to any of the notes

<sup>1</sup> Stanley v. Mather, 31 Fed. Rep. 860 (1887).

<sup>2</sup> White v. Allatt, 87 Cal. 245 (1890); s. c. 25 Pac. Rep. 420; Lambert v. Hyers, 22 Ill. App. 616 (1887); Seibert v. Minneapolis & St. L. R. R. Co. 52 (Minn.) 148, 246 (1893); s. c. 53 N. W. Rep. 1134; 20 L. R. A. 535; Mallory v. West Shore & H. R. R. Co., 3 Jones & S. (N. Y.) 174 (1873); Thompson v. Huron Lumber Co., 4 Wash. 600 (1892); s. c. 30 Pac. Rep. 741; Smith v. Lowther, 35 W. Va. 300 (1891); s. c. 13 S. E. Rep. 999; Knapp v. Troy & B. R. Co., 87 U. S. (20 Wall.) 117 (1874); bk. 22 L. ed. 328; Susquehanna & W. V. R. & Coal Co. v. Blatchford, 78 U. S. (11 Wall.) 172 (1871); bk. 20 L. ed. 179; Central Trust Co. v. Charlotte, C. & A. R. Co., 65 Fed. Rep. 264 (1895.)

**Statute gives the trustee power to foreclose** in some states. See: Gates v. Boston & N. Y. A. L. R. Co., 53 Conn. 346 (1885); s. c. 5 Atl. Rep. 695.

**In the absence of peculiar circumstances** justifying a bond-

holder cannot sue to foreclose a mortgage or trust deed, by which his note or bond is secured. 2 L. R. A. 535 note.

There are cases, however, where bondholders have been permitted to maintain actions to foreclose without any apparent question as to the propriety of the action in that particular form. See: Canadian Southern R. Co. v. Gebhard, 109 U. S. 527, 534 (1883); bk. 27 L. ed. 1020, 1023; Howwell v. McAden, 94 U. S. 463 (1877); bk. 24 L. ed. 254; Chicago, R. I. & P. R. Co. v. Howard, 74 U. S. (7 Wall.) 392 (1869); bk. 19 L. ed. 117; Wilmer v. Atlantic & R. A. L. R. Co., 2 Woods C. C. 447 (1875); s. c. Fed. Cas. No. 17,776.

**In Rhode Island** the trustees under a will probated in a foreign state may bring a foreclosure action, although the will has not been recorded in the latter state, where the mortgage was not the subject of the trust when created, but was acquired by the trustees under their power to invest the funds, as the legal title is in the trustees. Bradford v. King, 18 R. I. 743 (1894); s. c. 31 Atl. Rep. 166.

secured thereby or not,<sup>1</sup> and if he does not appear, his absence must be accounted for by refusal or neglect on his part, or by his default or misconduct;<sup>2</sup> and in such actions the representatives of the deceased joint mortgagees are not necessary parties to a suit to foreclose a mortgage by the survivor of three trustees who had no beneficial interest.<sup>3</sup> But in cases of the trustee's unreasonable neglect or refusal to discharge his duty,<sup>4</sup> any holder of a note or a bond may bring an action to enforce the security for the common benefit.<sup>5</sup> So may they where the trustee in the mortgage accepts the position of assignee in a general assignment by the mortgagor, and thereby assumes a position antagonistic to the interest of the noteholders or bondholders, which deprives him of his preferential right to bring suit for foreclosure, since as a trustee it is his duty to assert the preference of the bonds, while, as assignee, it is his duty to prevent it so far as possible.<sup>6</sup> But where the same person is trustee in two mortgages, a foreclosure of the first by him is not inconsistent with his position as trustee in the second mortgage.<sup>7</sup>

In all those cases where the security is simply a mortgage with a provision that on default the holder of the bonds, or any one or more of them, may take possession of the mortgagee's property for the common and joint benefit of all holders of the bonds, one bondholder may maintain a suit in his own name, for the benefit of all, to enforce payment by foreclosure.<sup>8</sup> And the holder of a note or bond may also file a bill to foreclose where the trust deed or

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<sup>1</sup> *Thompson v. Huron Lumber Co.*, 4 Wash. 600 (1892); s. c. 30 Pac Rep. 741.

<sup>2</sup> *Central Trust Co. v. Charlotte, C. & A. R. Co.*, 65 Fed. Rep. 264 (1895).

<sup>3</sup> *Landale v. McLaren*, 8 Man. Rep. 322 (1892).

<sup>4</sup> On refusal of trustee to foreclose holder of note or bond (See: *Ante*, § 34) beneficiaries or *cestui que trust* (See: *Post*, § 112) may bring action to foreclose the mortgage.

<sup>5</sup> *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 148, 206 (1893); s. c. 53 N. W. Rep. 1134; 20 L. R. A. 535.

<sup>6</sup> *American Tube & I. Co. v. Kentucky Southern Oil & G. Co.*, 51 Fed. Rep. 826 (1892).

<sup>7</sup> *Robinson v. Iron R. Co.*, 135 U. S. 522 (1890); bk. 34 L. ed. 276; s. c. 10 Sup. Ct. Rep. 907.

<sup>8</sup> *Mason v. York & C. R. Co.*, 52 Me. 82 (1861).

mortgage provides that the trustee may, in his own name or otherwise, file a bill to foreclose.<sup>1</sup>

It is not necessary that the trustee shall have possession of the land mortgaged as a condition precedent to the exercise of a power of sale in a trust deed, where the trustee is authorized, but not required, to take possession before making a sale thereunder.<sup>2</sup>

Under the California code,<sup>3</sup> a person who takes notes and a mortgage securing them, in his own name, for the benefit of the estate of a decedent, is the trustee of an express trust, and may maintain a foreclosure suit without joining with him the persons for whose benefit the action is prosecuted.<sup>4</sup>

§ 110a. Same—Delegation and substitution of power.—The rule is that a power of sale in a trust deed operating as a mortgage cannot be delegated by the trustee, but he must be personally present and supervise the sale, unless the deed expressly provides for the delegation.<sup>5</sup> And under a deed of trust providing that upon refusal of the trustee to make the sale the beneficiaries may appoint a substitute, a substitute so appointed by all the beneficiaries except one, who indorses his approval, but states that all his interest in the subject-matter has been settled, is in effect a substitution made by all the beneficiaries.<sup>6</sup> Although the power of sale in a trustee cannot be delegated, yet an action to foreclose a mortgage given by a corporation to secure its bonds may be maintained by one of three trustees, where one of the others is dead and the third is interested in the property and assets of another company which has purchased the property mortgaged, and is interested in such purchase.<sup>7</sup>

<sup>1</sup> Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279 (1889); s. c. 21 N. E. Rep. 569; Frink v. Neal, 37 Ill. App. 621 (1890).

<sup>2</sup> Jones v. Hagler, 95 Ala. 529 (1891); s. c. 10 So. Rep. 345.

<sup>3</sup> Cal. Code Civ. Proc., § 369.

<sup>4</sup> White v. Allatt, 87 Cal. 245 (1890); s. c. 25 Pac. Rep. 420.

<sup>5</sup> Smith v. Lowther, 35 W. Va. 300 (1891); s. c. 13 S. E. Rep. 999.

<sup>6</sup> Cates v. Mayes (Tex. 1889), 12 S. W. Rep. 51.

<sup>7</sup> Robinson v. Alabama & G. Mfg. Co., 48 Fed. Rep. 12 (1891).

§ 110b. Same—Request to foreclose.—All provisions in trust deeds or mortgages restrictive of the trustee's power to act, such as providing that in case of default he shall not act except upon a written demand of the holders of a specified amount of the outstanding indebtedness,—will be strictly construed. Thus under such a restriction a sufficient request for the foreclosure of the mortgage is made to the trustee in a mortgage securing several claims, with a condition that default in one shall render all due, by a written request by the holders of some claims that the deed be foreclosed, and that they believe that a sufficient default has been made to render the entire mortgage due, and that their action is for the benefit of everybody concerned in the deed.<sup>1</sup>

A provision of a trust deed, that it shall be the duty of the trustee upon a request in writing signed by the holders of not less than a quarter in amount of the bonds outstanding, to proceed to enforce the rights of the bondholders by the exercise of power given, in case of default in the payment of semi-annual interest remaining unpaid for six months, by entering and operating the property or selling it, does not require such written request, where the trustee acts upon his own motion,<sup>2</sup> and does not preclude the trustee from foreclosing immediately by suit upon default in payment of interest.<sup>3</sup> And it is said that a provision of a mortgage given by a railway company, that if default be made in payment of interest when due and demanded, and default shall continue for the space of six months; or if default be made in the payment of principal when due; it shall be the

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<sup>1</sup> *Heffron v. Gage*, 44 Ill. App. 147 (1891).

<sup>2</sup> *Farmers' Loan & T. Co. v. New York & N. R. Co.*, 78 Hun (N. Y.) 213 (1894); s. c. 28 N. Y. Supp. 933; s. c. 60 N. Y. S. R. 217.

<sup>3</sup> *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.*, 61 Fed. Rep. 543 (1894).

**A sale made under a trust deed at the request of only one of the beneficiaries is valid where the deed, which is to secure both or either of the beneficiaries, contains no provisions that one or both of them shall request the trustee to execute the power of sale.** *Jones v. Hagler*, 95 Ala. 529 (1891); s. c. 10 So. Rep. 345.



duty of the trustee to take appropriate proceedings at law or in equity to enforce the rights of the bondholders, upon a request signed by the holders of one-third in amount,—does not limit the right of the trustee to foreclose for interest not six months overdue.<sup>1</sup>

§ 110C. **Same—Same—Requiring stipulated percentage.**—A provision in a mortgage or trust deed that no proceedings at law or in equity shall be taken by the holder of any note or bond secured thereby, to foreclose the equity of redemption independently of the trustee, until after the refusal of the trustee to comply with a requisition first made upon him by the holders of a certain percentage of the notes or bonds secured by such mortgage or deed of trust, is valid. While such provisions are to be deemed *stricti juris*, they are to be reasonably construed in view of the nature of the security, and the interest of the holders of the notes or bonds as a class. It is not the purpose or effect of such a stipulation to divest the holders of the notes or bonds of their right to judicial remedies, or to oust the courts of their jurisdiction, but it is merely the imposition of certain conditions upon themselves in respect to the exercise of that right.<sup>2</sup> It has been said that such stipulations are agreements which the bondholders are at liberty to make, and there is nothing in them illegal or contrary to public policy.<sup>3</sup> In such a case each bondholder enters into contractual relations with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose is modified not only by the express provisions of the mortgage, but by the peculiar nature of the security.<sup>4</sup> It is said in the case

<sup>1</sup> *Mercantile Trust Co. v. Chicago, P. & St. L. R. Co.*, 61 Fed. Rep. 372 (1893).

<sup>2</sup> *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 148, 246 (1893); s. c. 53 N. W. Rep. 1134; 20 L. R. A. 535.

<sup>3</sup> *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47 (1882); bk. 27 L. ed. 47.

<sup>4</sup> *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 148, 206 (1895); s. c. 53 N. W. Rep. 1134; 20 L. R. A. 535. See: *Gates v. Boston & N. Y. A. L. R. Co.*, 53 Conn. 346 (1885); s. c. 5 Atl. Rep. 695; *Guilford v. Minneapolis, S. Ste. M. & A. R. Co.*, 48 Minn. 560 (1891); s. c. 51 N. W. Rep. 658; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 534, 537



of *Seibert v. Minneapolis and St. Louis Railroad Company*,<sup>1</sup> that the legislature would have had an undoubted right to have incorporated in the enabling statute authorizing the execution of the mortgage and the issuance of the bonds secured thereby, a provision requiring the mortgage to contain similar stipulations.<sup>2</sup> It is clear then that it would be competent for the bondholders themselves to agree to them. They are to be treated as *stricti juris*, but nevertheless are to be reasonably construed in view of the nature of the mortgage, which is the common security of all the bondholders, and the purposes to be subserved in making them. There is no doubt that the parties could lawfully provide in the same instrument for a reasonable extension of the time for the commencement of foreclosure proceedings, to be determined at the option of a majority of the bondholders.”<sup>3</sup>

§ III. Beneficiaries—When not necessary parties.—The supreme court of Minnesota, in the case of *Moulton v. Haskell*,<sup>4</sup> say that a real estate mortgage in trust to pay debts due from or assumed by the mortgagor upon sufficient consideration, may be enforced by the trustees in their own names without joining the *cestui que trust*. In that case one Peter Rauen, one of the defendants, had executed to the plaintiffs, as trustees for certain creditors, a deed of trust upon lands described in the complaint, for the purpose of securing the payment of certain notes executed and to be executed to said creditors. A subsequent agreement between the trustees named as grantees in the trust deed and the said Rauen, in pursuance of an express stipulation in the deed, was by them duly executed, sealed and acknowledged, wherein it is alleged: “Said parties did refer to said mortgage and the record thereof, and did further

(1883); bk. 27 L. ed. 1020, 1023, 1024; *Shaw v. Little Rock & Ft. S. R. Co.*, 100 U. S. 605, 612 (1880); bk. 25 L. ed. 757, 759

<sup>1</sup> 52 Minn. 148, 206 (1893); s. c. 53 N. W. Rep. 1134; 20 L. R. A. 535.

<sup>2</sup> *Howell v. McAden*, 94 U. S. 463, 466 (1877); bk. 24 L. ed. 254, 256.

<sup>3</sup> *Nute v. Hamilton Mut. L. Ins. Co.*, 72 Mass. (6 Gray) 174 (1856).

<sup>4</sup> 50 Minn. 367 (1892); s. c. 52 N. W. Rep. 960

recite that said Peter Rauen and Christian Rauen were, at the time of the execution and delivery of said mortgage, unable to state the amount of the notes intended to be secured thereby, or the date thereof, or the names of the payees therein, but have since determined and agreed with said trustees upon the same, and have executed said notes; that in said supplemental agreement it is expressly agreed that the notes referred to in said mortgage, and intended to be secured thereby, bear date August 13, 1886, and are executed by Peter Rauen to the respective persons therein named, and for the amounts set opposite their respective names, with interest thereon payable annually, at the rate of four per cent. per annum, both interest and principal being payable at the Farmers' and Mechanics' Savings Bank in Minneapolis, Minnesota, \* \* \* and that the said agreement of August 13, 1886, contained the names of said payees and the amounts of said notes."

In passing upon the case, the court say: "The supplemental agreement must be read and construed in connection with the trust deed, and remove all uncertainty and indefiniteness in respect to the debts secured thereby, and there can be no doubt that the trust deed, which must be treated as a mortgage, became operative as a valid security for the payment of the notes described in the agreement, and the trustees, Moulton and Huhn, were fully authorized, upon default in the payment thereof, to proceed to foreclose the same by an action in the district court. The trust is not one forbidden by our statute of uses and trusts. A mortgage is a mere chose in action. If assigned in trust it would be deemed a trust in personal property, and it is none the less so when executed to a mortgagee in trust to collect and apply the proceeds. The nature of the security would be the same in either case, and it would be enforced in the same way."<sup>1</sup>

The court further say that "it is a mortgage in trust to

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<sup>1</sup> The court cites, supporting this point, *Bucklin v. Bucklin*, 1 Abb. App. Dec. (N. Y.) 242 (1864); *Bunn*

*v. Vaughan*, 1 Abb. App. Dec. (N. Y.) 253 (1867).

satisfy a charge upon the land mortgaged, and it is not material that the charge is created by the same instrument, that is, by the mortgage. It is not necessary that the charge should be a pre-existing one."<sup>1</sup> The defendant Haskell purchased the property expressly subject to the mortgage, and agreed to pay it as a part of the purchase price or consideration of the conveyance, and was estopped to question the validity or sufficiency of the original consideration for the mortgage security.<sup>2</sup>

§ 112. **Beneficiaries, cestuis que trust, may sometimes foreclose.**—It has been held that the holders of the debt secured by a mortgage or trust deed providing that the trustee may, on default, file a bill to foreclose in his own name, "or otherwise," may maintain an action to foreclose.<sup>3</sup> And where a mortgage is assigned to the cashier of a bank as collateral security for a debt due the bank, the bank may foreclose without making the cashier a defendant.<sup>4</sup>

In all those cases where there is a good reason why the trustee cannot foreclose, or sufficient reason to believe he will not act, the beneficiaries, or *cestuis que trust*, may maintain an action of foreclosure. Thus, it has been said that one of two bondholders protected by a trust mortgage may bring an action for the foreclosure in his own name, where the trustee is absent in a foreign country, and the bondholder has sufficient reason to believe that he has become insane.<sup>5</sup> And it is held that a provision in a trust deed that on application of the lawful holder of the notes secured thereby, it shall be lawful for the trustee to file a bill for the foreclosure thereof, does not apply where the bill is brought by the *cestui que trust* himself jointly with the trustee.<sup>6</sup>

<sup>1</sup> Bucklin v. Bucklin, 1 Abb. App. Dec. (N. Y.) 242 (1864).

<sup>2</sup> Alt v. Banholzer, 36 Minn. 57 (1886); s. c. 29 N. W. Rep. 674.

<sup>3</sup> Frink v. Neal, 37 Ill. App. 621 (1890).

<sup>4</sup> Michigan State Bank of Eaton Rapids v. Trowbridge, 92 Mich. 217 (1892); s. c. 52 N. W. Rep. 632.

<sup>5</sup> Ettlinger v. Persian Rug & Carpet Co., 142 N. Y. 189 (1894); s. c. 58 N. Y. S. R. 303; 31 Abb. (N. Y.) N. C. 301; 36 N. E. Rep. 1055.

<sup>6</sup> Brown v. McKay, 151 Ill. 315 (1894); s. c. 37 N. E. Rep. 1037; affg. 51 Ill. App. 295.

The supreme court of Louisiana say that the holder of a majority of the bonds issued by a New Jersey corporation, secured by mortgaging upon lands in Louisiana giving the trustee the right of entry, possession and sale, and to enforce the rights of the bondholders by suit in equity, but providing that such right of entry and sale are cumulative remedies, which shall not deprive the trustee or the beneficiaries of any legal or equitable remedy by judicial proceedings consistent with the true intent and meaning of the mortgage, may maintain a suit in Louisiana for a foreclosure of the mortgage for the benefit of himself and all similarly situated, where there is no trustee, without going to New Jersey and having a new trustee appointed.<sup>1</sup> But the New Jersey court of chancery hold that powers of sequestration and sale given to a trustee in a mortgage cannot be exercised by a holder of bonds secured thereby, in a suit for its foreclosure upon refusal of the trustee to act upon a default in payment of interest.<sup>2</sup>

§ 113. Mortgages to persons in their official capacity—They or their successors may foreclose.—Where a bond and mortgage is given to a person in his official capacity, the mortgage may be foreclosed either by him or his successor in office or trust.<sup>3</sup> Thus the successor of a guardian, appointed by the probate court, may foreclose a mortgage given to his predecessor.<sup>4</sup> And the right of a sheriff to a judgment of foreclosure in an action upon a mortgage given to secure the purchase price of property sold by him in his official capacity at a public sale cannot be defeated on the ground that the rights of various parties in the mortgage debt have not been adjusted.<sup>5</sup>

<sup>1</sup> *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. Rep. 164 (1893).

<sup>2</sup> *McFadden v. Mays Landing & E. H. C. R. Co.*, 49 N. J. Eq. (4 Dick.) 348 (1891); s. c. 22 Atl. Rep. 932.

<sup>3</sup> See: *Norton v. Ohrns*, 67 Mich. 612 (1887); s. c. 35 N. W. Rep. 175;

12 West. Rep. 415; *Wall v. McMillan*, 44 S. C. 402 (1895); s. c. 22 S. E. Rep. 422.

<sup>4</sup> *Norton v. Ohrns*, 67 Mich. 612; s. c. 35 N. W. Rep. 175; 12 West. Rep. 415.

<sup>5</sup> *Wall v. McMillan*, 44 S. C. 402 (1895); s. c. 22 S. E. Rep. 424.

## CHAPTER VI.

### PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE. OWNERS OF THE FEE TITLE.

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| <p>§ 116. General principles.</p> <p>117. Mortgagor still owning the equity of redemption, necessary.</p> <p>118. Mortgagor no longer owner of equity of redemption, not necessary.</p> <p>121. Mortgagor, being a tenant in common or by the entirety, a necessary defendant.</p> <p>123. Mortgagor, still holding any kind of an equitable, contingent or latent interest, generally necessary—Sheriff's execution sale.</p> <p>124. Vendor and Vendee under land contract necessary.</p> <p>126. Purchaser and owner of equity of redemption, by grant or otherwise from the mortgagor, necessary.</p> <p>126a. Same—<i>Pact de non aliendo</i>.</p> <p>127. Owner of mortgaged premises omitted as defendant—Effect.</p> <p>129. Mesne owners of the equity of redemption, no longer owners, generally not necessary.</p> <p>130. Purchaser <i>pendente lite</i> not necessary.</p> <p>135. Wife of mortgagor or owner of the equity of redemption necessary.</p> | <p>§ 135a. Same—When land occupied as homestead.</p> <p>137a. Wife of mortgagor—Service of process—When mortgage upon community property.</p> <p>140a. Husband of married woman in possession claiming title, necessary.</p> <p>141. Heirs of mortgagor or owner of equity of redemption, necessary.</p> <p>141a. Same—In case of community property.</p> <p>142. Heirs of mortgagor or owner — When not necessary parties.</p> <p>145. Executors and administrators generally not necessary.</p> <p>146. Trustees, holding an interest of whatever kind in mortgaged premises for beneficiaries, necessary.</p> <p>147. <i>Cestuis que trust</i> and beneficiaries—When necessary.</p> <p>150. Remaindermen and reversioners necessary.</p> <p>152. Assignee in bankruptcy or by voluntary general assignment, and receiver, necessary.</p> <p>157. Tenants and occupants necessary.</p> |
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§ 116. General principles.—All parties who have an interest in the title to the land mortgaged are proper parties to an action to foreclose the mortgage; hence it has been said that the foreclosure of a mortgage and sale thereunder,



without making the holder of the legal title a party, do not transfer the legal title to the purchaser.<sup>1</sup> In those cases where the owner of land who disclaims interest therein at the time a mortgage is executed thereon by another as his own, or his vendee, is not a necessary party to an action to foreclose the mortgage.<sup>2</sup> And a purchaser with knowledge of an agreement by his vendor to give a purchase-money mortgage is a proper party in a suit to foreclose the mortgage.<sup>3</sup>

As to whether a person claiming title adverse and 'paramount to the mortgagor is a necessary party, there is a conflict in the decisions, the supreme court of California<sup>4</sup> holding that they are not, while under the liberal statutes of Indiana they are.<sup>5</sup> The supreme court of the United States have said that in a suit to establish a mortgage, and for a sale thereunder, it is competent to unite as defendants both the mortgagor and the party claiming the property

<sup>1</sup> *Berlack v. Halle*, 22 Fla. 236 (1886).

<sup>2</sup> *Lyon v. Morgan*, 143 N. Y. 505 (1894); s. c. 38 N. E. Rep. 960; 62 N. Y. S. R. 806.

**Doctrine of estoppel, when invoked to change title to land,** is to be applied with great caution. It permits verbal statements or admissions to be substituted in place of written evidence of transfer, which the Statute of Frauds and the general rules of law require in such cases, and hence should not be applied unless the grounds upon which it rests are clearly and satisfactorily established, and not then except in support of a clear equity or to prevent fraud. *Lyon v. Morgan*, 143 N. Y. 505, 509 (1894); s. c. 38 N. E. Rep. 960; *Thompson v. Simpson*, 128 N. Y. 270 (1891); s. c. 28 N. E. Rep. 627; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221, 230 (1881).

In the case cited in the text, the plaintiff, so far as the recorded title

showed, was a purchaser in good faith and for a valuable consideration, relying upon a recorded title, not affected by anything, so far as appeared, unless it was the admission which the owner made when his father assumed to mortgage it, and of those admissions he had no notice. It does not appear that there was any actual possession of the land when he purchased and took his conveyance that would operate as constructive notice, and, therefore, he was protected by the preceding act against an undisclosed equity in favor of the holder of the mortgage. *Lyon v. Morgan* 143 N. Y. 505, 509 (1894); s. c. 38 N. E. Rep. 960; *Holland v. Brown*, 140 N. Y. 344 (1893); s. c. 35 N. E. Rep. 577.

<sup>3</sup> *Harman v. Blackstone*, 61 Mo. App. 254 (1894).

<sup>4</sup> *McComb v. Spangler*, 71 Cal. 418 (1886); s. c. 12 Pac. Rep. 347.

<sup>5</sup> *Bundy v. Cunningham*, 107 Ind. 360 (1886); s. c. 8 N. E. Rep. 174. 5 West Rep. 540



adversely to the lien of the mortgage by virtue of proceedings for a sale for taxes had subsequently to its execution.<sup>1</sup> And it is held in New York that a decree foreclosing a mortgage is not invalid because unknown persons who may claim under the mortgagor—as a sailor who has not been heard from for years—are made parties under a general designation, without evidence that they are in fact unknown or absentees, or that the mortgagor died without heirs or next of kin.<sup>2</sup>

In some cases, parties claiming liens on the title of a mortgagor's grantor, which are superior to the mortgage, may be made parties and their interests litigated in foreclosure proceedings.<sup>3</sup> The general rule, however, is that mere general creditors without liens have no right to question the construction placed upon a mortgage of their debtor's property in a foreclosure suit between the parties interested in the mortgaged property.<sup>4</sup> And general creditors, who connect themselves with the title to mortgaged property only by a levy made subsequent to the mortgage, may be compelled to litigate their claims in a foreclosure suit.<sup>5</sup> Creditors, however, who, in an action for the foreclosure of a mortgage in which a mortgagor has made default, have filed answers asking for a sale to satisfy their own claims, but have not served them on the mortgagor, cannot, where no foreclosure is decreed and the mortgagor is not insolvent, have a decree for a sale to satisfy their claims.<sup>6</sup>

The heirs of a grantee are necessary parties defendant, and where they are not made parties to a foreclosure suit instituted after the conveyance, no title will vest in the purchaser at the sale against them.<sup>7</sup>

<sup>1</sup> *Mendenhall v. Hall*, 134 U. S. 559 (1890); bk. 33 L. ed. 1012; s. c. 10 Sup. Ct. Rep. 616.

<sup>2</sup> *Moran v. Conoma*, 36 N. Y. S. R. 680 (1891); s. c. 13 N. Y. Supp. 625.

<sup>3</sup> *Converse v. Michigan Dairy Co.*, 45 Fed. Rep. 18 (1891).

<sup>4</sup> *Omaha & St. L. R. Co. v. O'Neill*,

81 Iowa 463 (1890); s. c. 46 N. W. Rep. 1100.

<sup>5</sup> *Converse v. Michigan Dairy Co.*, 45 Fed. Rep. 18 (1891).

<sup>6</sup> *Hairston v. Hairston*, 35 S. C. 298 (1892); s. c. 14 S. E. Rep. 634.

<sup>7</sup> *Daugherty v. Deardorf*, 107 Ind. 527 (1886); s. c. 8 N. E. Rep. 296; 5 West. Rep. 850.

It has even been said, by the supreme court of New York, that the indorsers of a note are proper parties defendant to an action to foreclose a mortgage securing it, where they are liable to the mortgagees for the payment of the debt or some part of it.<sup>1</sup> But the United States circuit court of appeals has held that a land company which has guaranteed the principal and interest of mortgage bonds of a railroad company, under authority of the charter of the latter, is not an indispensable or even a proper party to a suit to foreclose the mortgage because it has paid notes given to raise money to pay interest coupons attached to the mortgage bonds, as it would be a proper party only when entitled to subrogation to the mortgage lien because of the payment, and payment of the whole debt is essential to subrogation.<sup>2</sup>

There is thought to be no question but that one in possession at the time of the commencement of the action is a proper party defendant to an action to foreclose a mortgage, in the absence of facts showing that he is in possession under some right or title superior and adverse to the mortgagor.<sup>3</sup> In South Dakota, however, it has been held that the owner of the equity of redemption is the only necessary party defendant to an action in equity to foreclose a real estate mortgage.<sup>4</sup>

A purchaser upon a foreclosure sale becomes a party to the suit to determine priority and validity of liens, without further citation, by tacitly agreeing to become the stakeholder instead of the sheriff, who is directed to retain the proceeds of sale and has acknowledged service.<sup>5</sup> And it is said that where the remainderman of mortgaged land acquiesces in a sale thereof under the mortgage, at which the title was acquired by the life tenant for much less than

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<sup>1</sup> *Patton v. Townsend*, 47 N. Y. S. (1890); s. c. 31 N. Y. S. R. 387; 24 R. 490 (1892); s. c. 19 N. Y. Supp. N. E. Rep. 791.

<sup>2</sup> *Columbia Finance & Trust Co. v. Kentucky U. R. Co.*, 60 Fed. Rep. 794 (1894).

<sup>3</sup> *Ruyter v. Reid*, 121 N. Y. 498

<sup>4</sup> *Carpenter v. Ingalls*, 3 S. D. 49 (1892); s. c. 51 N. W. Rep. 948.

<sup>5</sup> *Bourgeois v. Jacobs*, 45 La. An. 1310 (1893); s. c. 14 So. Rep. 68.

the real value of the property, a contract between the life tenant and a third person, by which the former was enabled to secure the property so cheaply because of the latter's agreement not to bid at the sale, in consideration of the execution to him of a mortgage on the property after it should be secured, cannot be assailed by the remainderman in a suit to foreclose the latter mortgage; the remedy is by application to set aside the first foreclosure sale.<sup>1</sup>

In a case where a wife joined with her husband in the execution of a mortgage, and her husband died, and after his death the mortgage debt matured, she was properly made a party defendant to the suit for foreclosure; and the result of such suit would ordinarily be to cut off her equity of redemption as effectually as if she had been discoverd at the time the note was executed; but she could not be made personally responsible for the debt.<sup>2</sup> And the supreme court of Georgia say that a wife and son who have joined in a petition to the chancellor to authorize the husband and father, who is the trustee, to mortgage the trust estate, having an interest in the property, are proper although not necessary parties to the foreclosure.<sup>3</sup>

In North Carolina it is held that the administrator is not a necessary party in an action by a mortgagee to foreclose a mortgage after the death of the mortgagor.<sup>4</sup> And in New York, that the purchaser of growing nursery trees at a constable's execution sale is not a necessary party to an action to foreclose a mortgage on the land.<sup>5</sup>

In a case where one of two mortgagees, who has surrendered the notes held by him, which represent half the mortgage debt, and has received in payment a deed for an undivided one-half of the premises, has no other or further

<sup>1</sup> *Hopkins v. Ensign*, 122 N. Y. 144 (1890); s. c. 25 N. E. Rep. 306; 33 N. Y. S. R. 299; 9 L. R. A. 731.

<sup>2</sup> *Hagerman v. Sutton*, 91 Mo. 519 (1887); s. c. 4 S. W. Rep. 73; 8 West. Rep. 312.

<sup>3</sup> *Bolles v. Munnerlyn*, 83 Ga. 727 (1880); s. c. 10 S. E. Rep. 365.

<sup>4</sup> *Fraser v. Bean*, 96 N. C. 327 (1887); s. c. 2 S. E. Rep. 159.

<sup>5</sup> *Batterman v. Albright*, 122 N. Y. 484 (1890); s. c. 25 N. E. Rep. 856; 34 N. Y. S. R. 131; 11 L. R. A. 800; 19 Am. St. Rep. 510.

interest in the premises beyond what he acquired by his deed, and is not a proper party defendant on foreclosure by the party owning the other half of the mortgage debt.<sup>1</sup> And in a case where a misdescription in a mortgage is discovered after the mortgage has been assigned, whereupon the mortgagee, with his wife, executes a further deed correcting the description, and an agreement is made between the mortgagor and mortgagee, correcting and confirming the mortgage, the mortgagee has no further interest in its enforcement, and is, consequently, not a necessary or proper party to an action to foreclose.<sup>2</sup>

But the general rule is that one who sets up a claim to the land, adverse and paramount to that of the mortgagor, cannot be joined as a codefendant in foreclosure.<sup>3</sup>

The supreme court of New York say that in a suit to foreclose a mortgage, and in case the mortgagor be held not to have been the owner of the fee, to enforce in plaintiff's behalf prior liens paid off with the money borrowed upon the mortgage, the former owners of the liens paid off are not necessary parties, since all of their rights are as effectually vested in the plaintiff as though the liens had been formally assigned.<sup>4</sup> And the supreme court of Arkansas say that it is not proper, in an action to foreclose a mortgage, to make a prior vendee of the land a party, to avoid his title as fraudulent; but if made a party it is a misjoinder of parties and causes of action, and can be corrected only by motion; and the objection is waived unless made.<sup>5</sup>

<sup>1</sup> *Sowles' Trustee v. Buck*, 62 Vt. 203 (1890); s. c. 20 Atl. Rep. 146.

<sup>2</sup> *Haaren v. Lyons*, 30 N. Y. S. R. 416 (1890); s. c. 9 N. Y. Supp. 211.

<sup>3</sup> *McComb v. Spangler*, 71 Cal. 418 (1886); s. c. 12 Pac. Rep. 347.

In Indiana a different rule prevails, however. In a recent case in the supreme court of that state it is said: "The purpose of our liberal statute upon the subject of parties defendants is to settle all conflicting titles and to determine the whole controversy in one suit; and when some

of the defendants in a foreclosure suit claim to own the property included in the mortgage, and deny the title of the mortgagors, they must assert their title. *Bundy v. Cunningham*, 107 Ind. 360 (1886); s. c. 8 N. E. Rep. 174; 5 West. Rep. 540."

<sup>4</sup> *Connecticut Mut. L. Ins. Co. v. Cornwell*, 72 Hun (N. Y.) 199 (1893); s. c. 55 N. Y. S. R. 480; 25 N. Y. Supp. 348.

<sup>5</sup> *Adams v. Edgerton*, 48 Ark. 419 (1887); s. c. 3 S. W. Rep. 628.

§ 117. **Mortgagor, still owning the equity of redemption, necessary.**—The mortgagor or person owning the equity of redemption being a necessary party defendant to an action to foreclose a mortgage, a sale under a decree in a foreclosure suit to which the owner of the equity of redemption is not a party conveys no title; the purchaser, however, becomes subrogated to the rights of the mortgagee in the premises, as well as in the mortgage debt.<sup>1</sup> And the rights of a grantor in an absolute deed which was in fact a mortgage are not affected by foreclosure of a mortgage made by the grantee, when he is not made a party to the suit, although he is estopped to contest the validity of the mortgage by silence when it was made.<sup>2</sup>

§ 118. **Mortgagor, no longer owner of equity of redemption, not necessary.**—A mortgagor who has disposed of all his interest in the property is not a necessary,<sup>3</sup> though a proper party<sup>4</sup> to a mortgage foreclosure, where no personal judgment is demanded against him;<sup>5</sup> but he ought not to be made a party merely for the purpose of settling some matter between him and the original defendant, in which the plaintiff had no interest.<sup>6</sup> Thus it has been said

<sup>1</sup> *Jordan v. Sayer*, 29 Fla. 558 (1892); s. c. 10 So. Rep. 823; See: *Post*, § 577.

<sup>2</sup> *Turman v. Bell*, 54 Ark. 273 (1891); s. c. 15 S. W. Rep. 886.

<sup>3</sup> *Boutwell v. Steiner*, 84 Ala. 307 (1888); s. c. 4 So. Rep. 184; 5 Am. St. Rep. 375; *West v. Miller*, 125 Ind. 70 (1890); s. c. 25 N. E. Rep. 143; *Hammons v. Bigelow*, 115 Ind. 363 (1888); s. c. 17 N. E. Rep. 192; 14 West. Rep. 851; *Bennett v. Mattingly*, 110 Ind. 197 (1887); s. c. 11 N. E. Rep. 792; 7 West. Rep. 912; *Johnson v. Foster*, 68 Iowa 140 (1885); s. c. 26 N. W. Rep. 39; *Watts v. Creighton*, 85 Iowa 154 (1892); s. c. 52 N. W. Rep. 12; *Stevens v. Ferry*, 48 Fed. Rep. 7 (1891).

<sup>4</sup> *Hammons v. Bigelow*, 115 Ind.

363 (1888); s. c. 17 N. E. Rep. 192; 14 West. Rep. 192.

<sup>5</sup> *West v. Miller*, 125 Ind. 70 (1890); s. c. 25 N. E. Rep. 143; *Bennett v. Mattingly*, 110 Ind. 197 (1887); s. c. 11 N. E. Rep. 792; 7 West. Rep. 912; *Hunsicker v. Richardson*, 13 Pa. Co. Ct. 524 (1893); s. c. 3 Pa. Dist. Rep. 178.

<sup>6</sup> *Bennett v. Mattingly*, 110 Ind. 197 (1887); s. c. 11 N. E. Rep. 792; 7 West. Rep. 912.

In *Washington* it is held that one whose lands have been sold and his rights thereto extinguished in an action to foreclose a mortgage cannot recover the same because the sale was not made subject to redemption, or because a valid deed has not been given to the purchaser by the sheriff, since



that mortgagors cannot urge, as an objection to a decree and order of sale in favor of the plaintiff in an action to foreclose, that a mortgagor in the same mortgage who had conveyed all his interest in the land to them, and against whom no personal judgment was sought, was not personally served with the process.<sup>1</sup>

The supreme court of Kansas, in the case of *Ashmore v. McDonnell*,<sup>2</sup> say that in a foreclosure suit, where the mortgagor, although not properly in court, and against whom no valid judgment is rendered, has conveyed away all his interest in the premises before the commencement of the action, and the holder of the legal title appears and answers, the court may find the amount of the mortgage and other liens upon the premises, and direct a sale thereof to satisfy them. And a mortgagor who has parted with his title to the mortgaged premises, and is relieved from all personal liability on the bond, cannot defend a suit to foreclose the mortgage, although he has a claim against the plaintiff for consequential damages, since a judgment on the mortgage will not conclude such a claim, and he can bring an independent action to recover therefor.<sup>3</sup>

Yet it is held by the supreme court of Indiana, in the case of *Insurance Company of North America v. Martin*,<sup>4</sup> that a mortgagor who has conveyed the mortgaged lands to one who assumes the mortgage debt is a necessary party to an action to be subrogated to the mortgagee's rights and to foreclose the mortgage for the amount of a policy, brought by an insurance company, which has paid the policy on a building on the mortgaged premises and taken an assignment from the mortgagee of his rights under the mortgage to the extent of the policy, in which it is necessary to a full determination of the right to enforce the claim to decide

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the provisions of the Washington statutes relating to sales under execution do not apply to mortgage foreclosures. *Stevens v. Ferry*, 43 Fed. Rep. 7 (1891).

<sup>1</sup> *Watts v. Creighton*, 85 Iowa 154 (1892); s. c. 52 N. W. Rep. 12.

<sup>2</sup> 139 Kan. 669 (1888); s. c. 18 Pac. Rep. 821.

<sup>3</sup> *Hunsicker v. Richardson*, 3 Pa. Dist. Rep. 173 (1893); s. c. 13 Pa. Co. Ct. 524.

<sup>4</sup> 139 Ind. 317 (1894); s. c. 37 N.E. Rep. 394.



whether the insurance money is payable to the mortgagee only in case of the inadequacy of the mortgage security.

§ 121. Mortgagor, being a tenant in common or by the entirety, a necessary defendant.—The general rule is that the owner of an undivided interest in lands, prior to the execution of a mortgage by his co-tenant, is not a necessary party to a foreclosure thereof. Hence a surviving partner is not a necessary, although he is a proper, party to an action to foreclose a mortgage given by a deceased partner to secure a partnership indebtedness, without binding himself personally to pay the debt.<sup>1</sup>

§ 123. Mortgagor, still holding any kind of an equitable, contingent or latent interest, generally necessary—Sheriff's execution sale.—The supreme court of Indiana, in the case of *Jewett v. Tomlinson*,<sup>2</sup> say that a purchaser of lands at an execution sale under a junior judgment lien is, before the expiration of the year allowed for redemption, merely a holder of a lien on the land which is subsequent and junior to a prior mortgage thereon, and is not a necessary party to an action to foreclose such mortgage. The only effect of not making him a party is that his right of redemption is extended and is not barred or foreclosed by the foreclosure proceeding. But under the South Carolina code,<sup>3</sup> one who claims land under a judgment against an executor for the recovery of the testator's debt is properly made a party to a suit for the foreclosure of a mortgage upon the same property, given by the testator's heirs.<sup>4</sup>

§ 124. Vendor and vendee under land contract necessary.—Under the general rule that the owner of the equity of redemption is a necessary party defendant to a foreclosure suit, the grantor and the grantee in an unexecuted contract of sale of the mortgaged premises should be made defendants. Thus, it is said that under the New York code<sup>5</sup>

<sup>1</sup> *London, Paris & American Bank v. Smith*, 101 Cal. 415 (1894); s. c. 35 Pac. Rep. 1027.

<sup>2</sup> 137 Ind. 326 (1893); s. c. 36 N. E. Rep. 1106.

<sup>3</sup> S. C. Code, § 139.

<sup>4</sup> *Sale v. Meggett*, 25 S. C. 72 (1885).

<sup>5</sup> N. Y. Code, Civ. Proc. § 452.

a grantee of mortgaged premises, assuming the mortgage by deed not recorded at the commencement of the foreclosure action, is entitled to be made a party defendant,<sup>1</sup> because it is well settled that the true owner of real property does not forfeit his right to be made a party to a foreclosure suit because he has omitted to record his deed, provided his application is made in due time.<sup>2</sup> In a case where a vendor who has turned over to the purchaser to secure him against a mortgage subsequently satisfied notes which the latter collects, may intervene in an action to foreclose a purchase money mortgage on the property given to such purchaser on a subsequent sale, and be subrogated to the lien of the mortgage to the amount of the notes, if it will not injure third persons.<sup>3</sup> And it is said that in a suit to establish and foreclose the lien of a mortgage and a judgment of foreclosure as against persons whose interests are inferior to the mortgage, but who were not made parties to the first suit, neither the mortgagor, nor the holder of the mortgage at the time of the first foreclosure, who bought the land at the foreclosure sale, but who has since assigned the mortgage and judgment to the plaintiff and sold all the land, are not necessary parties, but the grantee of such purchaser of a part of the land is a necessary party.<sup>4</sup>

§ 126. Purchaser and owner of the equity of redemption, by grant or otherwise from the mortgagor, necessary.—The owner and holder of the equity of redemption, by purchase from the mortgagor, or a mesne purchaser, whether in possession or not, is as much a necessary party to a foreclosure as a mortgagor who still owns and holds such equity of redemption. When such owner of the equity of redemption is not made a party to a suit to foreclose a mortgage, the decree is void as to him.<sup>5</sup>

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<sup>1</sup> *Johnson v. Donovan*, 106 N. Y. 269 (1887); s. c. 12 N. E. Rep. 594, 8 Cent. Rep. 685.

<sup>2</sup> *Id.*

<sup>3</sup> *McGuffey v. McLain*, 130 Ind. 327 (1891); s. c. 30 N. E. Rep. 296.

<sup>4</sup> *Byers v. Brannon* (Tex. 1892), 19 S. W. Rep. 1091.

<sup>5</sup> *Watts v. Julian*, 122 Ind. 124 (1890); s. c. 23 N. E. Rep. 698.

But the owner of the equity of redemption by virtue of an unrecorded deed, of which the mortgagee has no notice, not being in possession or exercising any acts of ownership over the property, cannot complain that he was not made a party defendant in an action to foreclose the mortgage,<sup>1</sup> or impeach the decree of foreclosure because he was not made a party.<sup>2</sup> Thus an association to which mortgaged land is conveyed by its manager by an unrecorded deed is not a necessary party to an action foreclosing the mortgage.<sup>3</sup> And a grantee under a deed unrecorded at the time of the record of a subsequent deed to a *bona fide* purchaser without notice, is not a necessary party to the foreclosure of a mortgage prior to both deeds, although at the time of filing of the *lis pendens* his deed is on record.<sup>4</sup>

It has been said that the holders of debentures which are a charge on mortgaged property, as they have an interest in the equity of redemption, are necessary parties to a foreclosure action.<sup>5</sup> And in the case of a joint mortgage given to secure two several notes, one of the mortgagees, who purchases of the mortgagor the equity of redemption, becomes the holder of the legal title, and is properly made a defendant on foreclosure.<sup>6</sup>

§ 126a. Same—Pact de non alienando.—But a different rule obtains where there is a stipulation in the mortgage against alienation. Thus it is said that a subsequent purchaser of mortgaged property is not a necessary party defendant in an action to foreclose the mortgage

<sup>1</sup> Connely v. Rue, 148 Ill. 207 (1893); s. c. 35 N. E. Rep. 824; Oakford v. Robinson, 48 Ill. App. 270 (1892); Hatfield v. Malcolm, 71 Hun (N. Y.) 51 (1893); s. c. 24 N. Y. Supp. 596, 53 N. Y. S. R. 863; 23 Civ. Proc. Rep. 197; Abraham v. Mayer, 7 Misc. (N. Y.) 250 (1894); s. c. 27 N. Y. Supp. 264; 58 N. Y. S. R. 29.

<sup>2</sup> Connely v. Rue, 148 Ill. 207 (1893); s. c. 35 N. E. Rep. 824.

<sup>3</sup> Hatfield v. Malcolm, 71 Hun N. Y. 51 (1893); s. c. 53 N. Y. S. R. 863; 23 Civ. Proc. Rep. 197; 24 N. Y. Supp. 596.

<sup>4</sup> Abraham v. Mayer, 7 Misc. (N. Y.) 250 (1894); s. c. 58 N. Y. S. R. 29, 27 N. Y. Supp. 264.

<sup>5</sup> Griffith v. Pound, L. R. 45 Ch. Div. 553 (1889).

<sup>6</sup> Johnston v. McDuffee, 83 Cal. 30 (1890); s. c. 23 Pac. Rep. 214

where it contains the *pact de non alienando*,<sup>1</sup> even where he has personally assumed its payment.<sup>2</sup> And this right of mortgagees under the clause *de non alienando* to enforce the mortgage without notice to a purchaser from the mortgagors is not waived or impaired by proceedings by ordinary action, instead of by executory process.<sup>3</sup> Neither does the death of the mortgagor impair or affect this right.<sup>4</sup>

§ 127. **Owner of mortgaged premises omitted as defendant—Effect.**—The owners of mortgaged premises are necessary parties defendant in all foreclosure proceedings, and a sale under foreclosure is void and conveys no title where the person holding the title to the land is not a party to the suit.<sup>5</sup> Thus it has been said that one in possession of land under a recorded deed made under an execution sale against the mortgagor is a necessary party to the foreclosure of the mortgage on the tract of land of which his land is part, and is not bound by a decree therein, where not made a party.<sup>6</sup> And the rights of a grantee in possession not made a party to foreclosure proceedings stipulated to be regular is not cut off by such proceedings, or by the entry of one claiming thereunder.<sup>7</sup>

It has been held that the purchaser at an invalid sale under a trust deed, who has made repairs and paid insurance and taxes and given another trust deed on the premises, and the trustees under both deeds, are proper parties plaintiff to a petition in equity to foreclose the original

<sup>1</sup> *Fleitas v. Meraux*, 47 La. An. 232 (1895); s. c. 16 So. Rep. 848; *Truxillo v. Delaune*, 47 La. An. 10 (1895); s. c. 16 So. Rep. 642.

<sup>2</sup> *Truxillo v. Delaune*, 47 La. An. 10 (1895); s. c. 16 So. Rep. 642.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Griffin v. Hodshire*, 119 Ind. 235 (1889); s. c. 21 N. E. Rep. 741. See: *Thompson v. Smith*, 96 Mich. 258 (1893); s. c. 55 N. W. Rep. 886; Bal-

lard v. Carter, 71 Tex. 161 (1888); s. c. 9 S. W. Rep. 92.

<sup>6</sup> *Ballard v. Carter*, 71 Tex. 161 (1888); s. c. 9 S. W. Rep. 92.

The owner of the equity of redemption and the lessee in possession of mortgaged premises are properly made parties to a bill to foreclose a railroad mortgage. *Beekman v. Hudson River West Shore Co.*, 35 Fed. Rep. 3 (1888).

<sup>7</sup> *Thompson v. Smith*, 96 Mich. 258 (1893); s. c. 55 N. W. Rep. 886.

trust deed.<sup>1</sup> And where the owner of a note and mortgage asks and obtains a personal judgment for the amount of the note against the makers thereof, and a decree foreclosing the mortgage, and an order for the sale of the land, and also a judgment against the vendee of the mortgagors, who purchased the land after the execution of the mortgage, decreeing her rights in the land to be subject and inferior to his mortgage lien, such vendee does not thereby become the debtor of the mortgagee.<sup>2</sup>

§ 129. Mesne owners of the equity of redemption no longer owners, generally not necessary.—The general rule is that persons who have parted with their entire right and title in mortgaged premises are not necessary parties in an action against their grantee to reform and foreclose the mortgage;<sup>3</sup> and for that reason it is not proper, in an action for foreclosure of a mortgage, to join as original defendants the intermediate purchasers of the equity of redemption, and order each one to pay the mortgage debt and indemnify his predecessor in title to the property.<sup>4</sup>

§ 130. Purchaser pendente lite not necessary.—It has been said the general rule that possession of real estate is notice to all the world of the rights of the possessor does not apply where the possession is continuous after a full conveyance by the person in possession, and recording of the deed. Hence, one in possession, who conveys by absolute deed, with an oral agreement that he shall have a re-conveyance upon certain conditions, is not a necessary party to the foreclosure of a mortgage made by his grantee after a re-conveyance by the latter, but before the recording of such conveyance; nor has the person in possession any right to redeem from the sale under the mortgage.<sup>5</sup> And one who takes a conveyance of real estate pending a

<sup>1</sup> Wolff v. Ward, 104 Mo. 127 (1891); s. c. 16 S. W. Rep. 161.

<sup>2</sup> Searing v. Benton, 41 Kan. 618 (1889); s. c. 21 Pac. Rep. 800.

<sup>3</sup> Lockwood v. White, 65 Vt. 466 (1893); s. c. 26 Atl. Rep. 639.

<sup>4</sup> Walker v. Dickson, 20 Ont. App. 96 (1892).

<sup>5</sup> Sprague v. White, 73 Iowa 670 (1887); s. c. 35 N. W. Rep. 751.



suit to have the deed to his grantor declared a mortgage is not a necessary party to the suit; and the fact that he is a citizen of the state in which the suit is pending in the United States court, will not prevent his intervening in the case, of which the court has already jurisdiction, when the object is to assert or protect his rights or equities in property before the court. Where he does not intervene, although he has testified in the case, showing his actual knowledge of its pendency, the court will not refuse relief on the motion of his grantor defendant in the suit on the ground that his grantee might show payments before the bringing of the suit.<sup>1</sup>

§ 135. *Wife of the mortgagor or owner of the equity of redemption necessary.*—In all the states where the common law doctrine of dower remains unchanged, as well as in many of those states where the wife's rights in the estate of her husband is regulated by statute, the general rule is that the wife of the mortgagor is a necessary party to an action foreclosing a mortgage.<sup>2</sup> Some cases hold that this is true even when the husband has sold the mortgaged premises.<sup>3</sup> But this is not the case where the wife joins in the conveyance of premises which have previously been mortgaged by her husband.<sup>4</sup> So, also, is the wife of the owner of the equity of redemption a necessary party to a suit to foreclose a mortgage.<sup>5</sup>

The object in making the wife of the mortgagor or owner of the equity of redemption parties defendant is to

<sup>1</sup> *Shropshire v. Lyle*, 31 Fed. Rep. 694 (1887).

<sup>2</sup> *Kimbrell v. Rogers*, 90 Ala. 339 (1890); s. c. 7 So. Rep. 241; *Fitzgerald v. Fernandez*, 71 Cal. 504 (1886); s. c. 12 Pac. Rep. 562; *Hefner v. Urton*, 71 Cal. 479 (1886); s. c. 12 Pac. Rep. 486; *Holland v. Holland*, 131 Ind. 196 (1892); s. c. 30 N. E. Rep. 1075; *Sutherland v. Tyner*, 72 Iowa 232 (1887); s. c. 33 N. W. Rep. 645; *Gibbs v. O'Neil*, 85 Mich. 333 (1891); s. c. 48 N. W. Rep. 696;

*Kursheedt v. Union Dime Savings Inst.*, 118 N. Y. 358 (1890); s. c. 23 N. E. Rep. 473; 28 N. Y. S. Rep. 933; 7 L. R. A. 229; *Vanstory v. Thornton*, 114 N. C. 377 (1894); s. c. 19 S. E. Rep. 359; See. 112 N. C. 196.

<sup>3</sup> *Holland v. Holland*, 131 Ind. 196 (1892); s. c. 30 N. E. Rep. 1075.

<sup>4</sup> *Koerner v. Gauss*, 57 Ill. App. 668 (1894).

<sup>5</sup> *Holland v. Holland*, 131 Ind. 196 (1892); s. c. 30 N. E. Rep. 1075.



enable her to assert and defend any rights she may have in the mortgaged premises.<sup>1</sup> Consequently a married woman is a proper party defendant to a suit to foreclose and cut off her right by a sale of the fee under a mortgage executed by her in the manner prescribed by statute for the relinquishment of her inchoate right of dower.<sup>2</sup> Under the New York code<sup>3</sup> barring parties who claim, under unrecorded deeds from a defendant in foreclosure, the inchoate dower right of the wife of defendant in the foreclosure of a mortgage given by his grantor, where neither she nor the grantor is served or appear as defendants, the grantor being simply named in the summons, although the conveyance was not recorded or known to the plaintiff, is not cut off. The reason for this is because her right is not derived from the husband, but from the grantor.<sup>4</sup>

§ 135a. Same—When land occupied as a homestead.—In those states where the statutes provide for homesteads for the heads of families, the wife of the mortgagor of land occupied and claimed by him as a homestead is a necessary party to the foreclosure of the mortgage and to an action of ejectment by the purchaser at the sale thereunder, although the mortgage is given for purchase money.<sup>5</sup> And in those cases where a married man has filed a declaration of homestead on his mortgaged premises, his wife is a necessary party defendant in foreclosure; and if she is not made a party, the purchaser at the foreclosure sale is not entitled to a writ of assistance against her husband.<sup>6</sup>

<sup>1</sup> Vanstory v. Thornton, 114 N. C. 377 (1894); s. c. 19 S. E. Rep. 359; See: 112 N. C. 196.

<sup>2</sup> Kimbrell v. Rogers, 90 Ala. 339 (1890); s. c. 7 So. Rep. 241.

<sup>3</sup> N. Y. Code Civ. Proc. § 132.

<sup>4</sup> Kursheedt v. Union Dime Savings Inst. 118 N. Y. 358 (1890); s. c. 23 N. E. Rep. 473; 28 N. Y. S. R. 933; 7 L. R. A. 229.

<sup>5</sup> Gibbs v. O'Neil, 85 Mich. 333 (1891); s. c. 48 N. W. Rep. 696.

**Holder of a junior judgment** not a necessary party. Sutherland v. Tyner, 72 Iowa 232 (1887); s. c. 33 N. W. Rep. 645.

**As to whether heirs are necessary parties** where wife mortgages homestead. See: *Post* § 142.

<sup>6</sup> Hefner v. Urton, 71 Cal. 479 (1886); s. c. 12 Pac. Rep. 486; Fitzgerald v. Fernandez, 71 Cal. 504 (1886); s. c. 12 Pac. Rep. 562.

§ 137a. Wife of mortgagor—Service of process—Where mortgage upon community property.—At common law, and under the chancery practice of many of the states, the summons in foreclosure is not required to be served upon the wife of the mortgagor or owner of the equity of redemption. This rule of practice is founded on the old fiction that the husband and wife are one person, and the husband that person, charged by law with the protection of the wife's person and property—unless it be her separate estate. This fiction of the common law has been abolished in most, if not all the states, and the service of the summons in foreclosure cases is required to be made upon the wife personally. But it seems that in some of the western states, particularly those carved out of the territory acquired by the "Louisiana Purchase," in which the civil law doctrine of community property prevails,<sup>1</sup> in an action to foreclose a mortgage on what is known as "community property,"<sup>2</sup> service upon the wife may be made by delivering a copy of the summons to her husband. This is on the theory that the husband is the manager or trustee of the community property, representing both himself and his wife.<sup>3</sup> But where the wife dies before suit is brought to foreclose, or pending foreclosure proceedings, the wife's heirs must be made parties and served with process, otherwise a sale under the decree will be void as to one-half of the lands mortgaged.<sup>4</sup>

§ 140a. Husband of married woman in possession claiming title, necessary.—The supreme court of the United States, in the case of *Anderson v. Watt*,<sup>5</sup> say that the husband of one in possession of land in Florida claiming title is a necessary party, with his wife, to an action to foreclose a mortgage thereon.

<sup>1</sup> See: 3 Kerr on Real Prop. § 1946, *et seq.*

<sup>2</sup> See: 3 Kerr on Real Prop. §§ 1982-1988.

<sup>3</sup> *Johnson v. Richmond Beach Improvement Co.*, 63 Fed. Rep. 493.

<sup>4</sup> *Johnston v. San Francisco Sav. Union*, 75 Cal. 134 (1888); s. c. 16 Pac. Rep. 753; 7 Am. St. Rep. 129.

<sup>5</sup> 138 U. S. 694 (1891); bk. 34 L. ed. 1078; s. c. 11 Sup. Ct. Rep. 449.

§ 141. Heirs of mortgagor or owner of equity of redemption necessary.—The general rule is that the heirs of a deceased mortgagor are necessary parties to an action for the foreclosure of a mortgage,<sup>1</sup> but his administrator, though a proper party, is not a necessary one.<sup>2</sup> Consequently, it has been said that where the holder of a mortgage after the death of the mortgagor foreclosed the mortgage, making no person a party except the holder and the mortgagor, service being made by publication, the proceedings, including the sheriff's deed, are void as against the heir of the mortgagor and his grantee.<sup>3</sup> The supreme court of Iowa, in the case of *Harsh v. Griffin*,<sup>4</sup> say that where minor heirs, owning an undivided two-thirds of certain real estate, are not made parties to the foreclosure of a mortgage thereon, their only right is to redeem from the mortgage. And the supreme court of California hold that the heirs of a deceased mortgagor have the right, notwithstanding their claim to the lands and for partition is hostile to the mortgagee, to intervene in a suit to foreclose the mortgage, in which it is sought under a provision in the mortgage to have the lands placed in the hands of a receiver and to apply the proceeds on a judgment, so that the heirs' right of possession and interest in the homestead lands and in the rents and proceeds are attacked and liable to be interfered with.<sup>5</sup>

<sup>1</sup> For exceptions to this rule see *Post*, § 142.

<sup>2</sup> *Hill v. Townley*, 45 Minn. 167; s. c. 47 N. W. Rep. 653. See: *Ballard v. Kennedy*, 34 Fla. 483 (1894); s. c. 16 So. Rep. 327; *Harsh v. Griffin*, 72 Iowa, 608 (1887); s. c. 34 N. W. Rep. 441.

In California it is held that the heirs-at-law of a mortgagor are not necessary parties to an action to foreclose the mortgage, as no equity of redemption vests in the heirs-at-law of the mortgagor of a homestead, upon the death of the latter, where the title thereto vests in the wife of the mort-

gagor. *Collins v. Scott*, 100 Cal. 446 (1893); s. c. 34 Pac. Rep. 1085.

In Florida the heir-at-law of a deceased mortgagor is a proper but not a necessary party to an action to foreclose the mortgage, under the state statute making the realty of the decedent assets in the hands of his executor or administrator. *Ballard v. Kennedy*, 34 Fla. 483 (1894); s. c. 16 So. Rep. 327.

<sup>3</sup> *Richards v. Thompson*, 43 Kan. 209 (1890); s. c. 23 Pac. Rep. 106.

<sup>4</sup> 72 Iowa 608 (1887); s. c. 34 N. W. Rep. 441.

<sup>5</sup> *Hoppe v. Fountain*, 104 Cal. 94 (1894); s. c. 36 Pac. Rep. 389.

§ 141a. Same—In case of community property.—In California, where the doctrine of community property<sup>1</sup> prevails, it is held that a decree of foreclosure of a mortgage upon community property, rendered after the wife's death,<sup>2</sup> where the husband is served with the process, but the wife's minor children are not, is void with respect to one-half of the lands mortgaged.<sup>3</sup> But where a husband, after his wife's death, executes a trust deed upon community lands, in which the interest of the wife's children as heirs of the mother are expressly excepted, are not entitled to intervene in a suit to foreclose the trust deed, setting up their ownership as their mother's heirs to an undivided half interest in the land, as they have a plain legal remedy to secure their interest and to contest the matter with the grantee or the purchaser in the foreclosure proceedings.<sup>4</sup>

§ 142. Heirs of mortgagor or owner—When not necessary parties.—In some of the states an heir is not a necessary party to the foreclosure of a mortgage made by his ancestor.<sup>5</sup> In other states, where a different rule prevails, as above pointed out,<sup>6</sup> there are instances in which the heirs of a mortgagor are not necessary parties to a foreclosure. Thus if a mortgagor assigns all his estate to an assignee for benefit of creditors, and dies, his heirs at law are not necessary parties to an action of foreclosure;<sup>7</sup> and inasmuch as a mortgage executed by a widow, purporting to convoy the entire estate in premises set apart to her and her minor children as a homestead, does not affect the interest of such

<sup>1</sup> See: *Ante*, § 137a. Also, 3 Kerr on Real Property, § 1946 *et seq.*

<sup>2</sup> As to service upon wife when mortgage on community property. See: *Ante*, § 137a.

<sup>3</sup> *Johnston v. San Francisco Sav. Union*, 75 Cal. 134 (1888); s. c. 16 Pac. Rep. 753; 7 Am. St. Rep. 129.

<sup>4</sup> *Hinzie v. Kempner*, 82 Tex. 617 (1891); s. c. 18 S. W. Rep. 659.

<sup>5</sup> *Merritt v. Daffin*, 24 Fla. 320 (1888); s. c. 4 So. Rep. 806; *Tierney*

*v. Spiva*, 97 Mo. 98; s. c. 10 S. W. Rep. 433.

**Grantees of heirs not necessary, when**—Under the Missouri statutes of 1845 and 1855 the heirs and devisees of the mortgagor not being necessary parties to a foreclosure suit, it is not necessary to make their grantees defendants. *Tierney v. Spiva*, 97 Mo. 98 (1889); s. c. 10 S. W. Rep. 433.

<sup>6</sup> See: *Ante*, § 141.

<sup>7</sup> *Butler v. Williams*, 27 S. C. 221 (1887); s. c. 3 S. E. Rep. 211.

minor children, they are therefore not necessary parties to the foreclosure of such mortgage.<sup>1</sup>

In those cases where neither the original trustee nor the assignee of a mortgage held in trust for the benefit of third parties disposes thereof by will, the interest of such trustee or assignee passes on his death to his personal representatives and neither his heirs nor devisees are necessary parties to a suit to foreclose.<sup>2</sup>

§ 145. **Executors and administrators generally not necessary**—It is said that the personal representative of a deceased mortgagor is not a necessary party to an action to foreclose the mortgage, notwithstanding the complaint contains a prayer for judgment for the deficiency.<sup>3</sup> And the court of appeals of New York hold that one of two executors in whom the legal estate of the testator does not vest, who fails to qualify, is not a necessary party to an action to foreclose a mortgage of the testator's lands.<sup>4</sup> In Missouri the administrator of the mortgage is the only necessary party defendant to a suit of foreclosure.<sup>5</sup> And in Florida an administrator who holds the real estate of his intestate as assets is the only necessary party to a suit for the foreclosure of a mortgage made by the intestate.<sup>6</sup>

§ 146. **Trustees, holding an interest of whatever kind in mortgaged premises for beneficiaries, necessary**.—The universal rule is that in a suit in chancery to foreclose a trust deed in the nature of a mortgage, the grantee in such deed, in whom the legal title is vested, is an indispensable party.<sup>7</sup> And it is said that a trustee in whom the legal title to premises is vested by a mortgage sought to be foreclosed may properly be made a party

<sup>1</sup> Hoppe v. Fountain, 104 Cal. 94 (1894); s. c. 37 Pac. Rep. 894.

<sup>2</sup> Lambertville Nat. Bank v. McCready Bag & Paper Co. (N. J. Ch. 1888), 1 L. R. A. 334; s. c. 15 Atl. Rep. 388.

<sup>3</sup> Butler v. Williams, 27 S. C. 221 (1887); s. c. 3 S. E. Rep. 211.

<sup>4</sup> Steinhardt v. Cunningham, 130

N. Y. 292 (1891); s. c. 29 N. E. Rep. 100; 41 N. Y. S. R. 527.

<sup>5</sup> Hall v. Klepzig, 99 Mo. 83 (1889); s. c. 12 S. W. Rep. 372.

<sup>6</sup> Merritt v. Daffin, 24 Fla. 320 (1888); s. c. 4 So. Rep. 806.

<sup>7</sup> Lambert v. Hyers, 22 Ill. App. 616 (1887).



defendant, individually as well as in his capacity as trustee, to a cross-bill filed by a judgment creditor of the mortgagor, praying that the mortgage be declared fraudulent and void and the proceeds of the property be applied to his judgment.<sup>1</sup>

In an English case, it is said that a mortgagee who is a trustee of his mortgage for the beneficial owners of the mortgage money, and who has become bankrupt, cannot, as defendant to a foreclosure action by a prior mortgagee, properly represent his *cestuis que trust*, but, notwithstanding Rule 8 of Order 16, the *cestuis que trust* are necessary parties to the action.<sup>2</sup>

§ 147. *Cestuis que trust* and beneficiaries.—When necessary.—The general rule is that a *cestui que trust* is a proper but not a necessary party to foreclosure of a mortgage given by his trustee; and if for any reason his presence upon the record as a party defendant is desirable, the remedy is not by demurrer for a defect of parties, but by motion to have him brought in.<sup>3</sup> And the United States circuit court for the western district of Tennessee have held that where one partner conveys to the other his interest, upon a contract that the latter will assume and pay his debts and an annuity to himself, a bill to foreclosure the mortgage should make the creditors parties.<sup>4</sup>

§ 150. Remaindermen and revisioners necessary.—The supreme court of New York have recently said that the holders of vested remainders in a share of an estate devised in trust to pay the income to testator's son for life and divide the principal among his children are not represented by the trustee in a foreclosure suit to which he is made a party, so as to cut off their rights in the premises.<sup>5</sup>

<sup>1</sup> *Mobile Sav. Bank v. Burke*, 94 Ala. 195 (1891); s. c. 10 So. Rep. 328.

<sup>2</sup> *Francis v. Harrison*, L. R. 43 Ch. Div. 183 (1889).

<sup>3</sup> *Harlem Co-op. Bldg. & L. Assoc. v. Quinn*, 32 N. Y. S. R. 909 (1890); s. c. 10 N. Y. Supp. 682.

<sup>4</sup> *Hunt v. Fisher*, 29 Fed. Rep. 801 (1887).

<sup>5</sup> *Levy v. Levy*, 79 Hun (N. Y.) 290 (1894); s. c. 29 N. Y. Supp. 384; 60 N. Y. S. R. 561; 31 Abb. (N. Y.) N. Cas. 468.



§ 152. Assignee in bankruptcy or by voluntary general assignee and receiver, necessary.—The general rule is that an assignee in bankruptcy is a necessary party to the foreclosure of a prior mortgage, when his title is subject thereto;<sup>1</sup> and until he has actually distributed the balance of assets as directed by the decree on accounting, he is a proper party in a foreclosure action to cut off his assignor's former equity of redemption in the mortgaged premises.<sup>2</sup> But where the circumstances of the case are such as to create a legal presumption that the purposes for which the trusts under a general assignment were created have ceased, and that consequently the estate of the trustee has ceased, and the title to realty covered thereby has reverted to the assignor,—the title acquired under a sale in a suit to foreclose a mortgage made by the assignor on land included in the assignment, but which had not been conveyed by the assignee, may be held good and marketable, although the assignee was not made a party to the foreclosure suit.<sup>3</sup> And it is said that a mortgagee and an assignee of the mortgage cannot complain because a subsequent assignee is not made a defendant in an action to foreclose the mortgage.<sup>4</sup>

Under this general rule also falls a receiver in bankruptcy;<sup>5</sup> yet a receiver in bankruptcy and tenants under him, in possession of mortgaged premises, are not such necessary parties to a suit to foreclose the mortgage as to render a decree made in their absence erroneous.<sup>6</sup> And the New York supreme court recently declared that a valid sale of the property of a corporation under a decree of foreclosure may be made without making a receiver of the corporation appointed after the entry of the decree a party to

<sup>1</sup> *Ostrander v. Hart*, 30 N. Y. S. R. 170 (1890); s. c. 8 N. Y. Supp. 809; *Julien v. Lalor*, 47 Hun (N. Y.) 164; s. c. 14 N. Y. S. R. 392.

<sup>2</sup> *Julien v. Lalor*, 47 Hun (N. Y.) 164 (1888); s. c. 14 N. Y. S. R. 392.

<sup>3</sup> *Kip v. Hirsh*, 103 N. Y. 565

(1886); s. c. 9 N. E. Rep. 317; 5 Cent. Rep. 375.

<sup>4</sup> *Michigan State Bank of Eaton Rapids v. Trowbridge*, 92 Mich. 217 (1892); s. c. 52 N. W. Rep. 632.

<sup>5</sup> See: *Post*, § 174.

<sup>6</sup> *Heffron v. Gage*, 44 Ill. App. 147 (1891).

the foreclosure action, and without notice to him, especially where the judgment appointing him expressly declares that it shall not in any way prejudice the rights of the plaintiff in the foreclosure under his decree, and shall not operate as a stay in such action.<sup>1</sup>

The supreme court of Illinois, in the recent case of *Heffron v. Gage*,<sup>2</sup> say that a receiver appointed to take possession of and conduct a hotel business, in proceedings for the dissolution of a hotel partnership, is not vested with any such title to or interest in the property as will render it necessary to make him and all his lessees parties to a bill to foreclose a trust deed executed on such property by the partners before the proceedings for dissolution.

§ 157. Tenants and occupants, necessary.—The New York court of appeals, in the case of *Equitable Life Assurance Society v. Bostwick*,<sup>3</sup> held that a party in possession is properly made a party in foreclosure. In the course of the opinion Judge Danforth, speaking for the court, says: "Donovan was properly made a party to the action, because he was in possession of the premises affected by the foreclosure, and if, as to the appellants, he had, by assuming the payment of the mortgage debt, become principal debtor, it may be that the plaintiffs would have been bound upon request to proceed against him in that capacity also. This decision has not been modified."<sup>4</sup>

<sup>1</sup> *Preston v. Loughran*, 58 Hun (N. Y.) 210 (1890); s. c. 34 N. Y. S. R. 391; 12 N. Y. Supp. 313.

<sup>2</sup> 149 Ill. 182 (1894); s. c. 36 N. E. Rep. 569.

<sup>3</sup> 100 N. Y. 628 (1885); s. c. 3 N. E. Rep. 296; 1 Cent. Rep. 523.

<sup>4</sup> Citing: *Colgrove v. Tallman*, 67 N. Y. 95 (1876).

## CHAPTER VII.

### PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE —SUBSEQUENT MORTGAGEES AND LIENORS.

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| <p>§ 158. Introductory.</p> <p>159. Subsequent mortgagers still owning their mortgages, necessary defendants.</p> <p>160. Subsequent mortgagees—Remedies if omitted as defendants.</p> <p>162. Subsequent judgment creditors, still owning judgments, necessary defendants.</p> | <p>§ 164. Judgment creditors—Remedies if omitted as defendants.</p> <p>166. Subsequent lienors.</p> <p>166a. Same—Terre-tenants.</p> <p>176. Purchasers at tax sales, boards of supervisors, state controllers and municipal corporations, defendants.</p> |
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§ 158. Introductory.—While it is true, as a general rule, that the equities of junior incumbrancers made defendants in a mortgage-foreclosure suit may be adjusted in such suit as between themselves;<sup>1</sup> yet a second mortgage is not affected by a foreclosure sale under a prior mortgage, where the purchaser pays nothing for the conveyance and conveys the land to the mortgagor without consideration.<sup>2</sup>

§ 159. Subsequent mortgagees still owning their mortgages, necessary defendants. — Later authorities seem to tend to vary the old rule that all subsequent mortgagees or incumbrancers are necessary parties to a mortgage foreclosure. The supreme court of Maryland in the recent case of *Chilton v. Brooks*,<sup>3</sup> say that on the foreclosure of a mortgage under a power of sale contained therein, subsequent incumbrancers need not be made parties. And according to the supreme court of North Carolina, subsequent incumbrancers are proper parties in a foreclosure proceeding, but not necessary parties.<sup>4</sup>

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<sup>1</sup> *Norwood v. Norwood*, 36 S. C. 321 (1892); s. c. 15 S. E. Rep. 382.      Rep. 868; 28 Am. & Eng. Corp. Cas. 32.

<sup>2</sup> *Moore v. Lindsey*, 52 Mo. App. 474 (1893).

<sup>4</sup> *Williams v. Kerr*, 113 N. C. 306 (1893); s. c. 18 S. E. Rep. 501.

<sup>3</sup> 71 Md. 445 (1889); s. c. 18 Atl.

(1125)

§ 160. Subsequent mortgagees—Remedies if omitted as defendants.—The supreme court of New York, in the case of *Moulton v. Carnish*,<sup>1</sup> say that notwithstanding the provisions of the New York Code of Civil Procedure,<sup>2</sup> as to ordinary foreclosure, the former remedy in equity to require a subsequent incumbrancer who has not been made a party to a suit to foreclose a prior mortgage and the sale thereunder, to redeem therefrom within six months, or be forever foreclosed, still remains. It is said that the assignee of a second mortgage by assignment duly recorded, who was not made a party to a foreclosure by action after the assignment of a prior mortgage, at the sale under which the mortgagee became the purchaser, may maintain an action for the foreclosure of her mortgage notwithstanding the sale under the prior mortgage, and is not confined to redeeming from such sale and prior mortgage.<sup>3</sup>

§ 162. Subsequent judgment creditors, still owning judgments, necessary defendants.—The general rule is that all judgment creditors, who still own the judgments, recovered, are necessary parties defendant in foreclosure proceedings,<sup>4</sup> but creditors who have not obtained judgments and have no liens cannot intervene, in a suit to foreclose a mortgage.<sup>5</sup> Thus it has been said that the general creditors of a trustee who executed a mortgage to secure the repayment of trust funds converted to his own use cannot question the right to foreclose it, on the ground that no default has been made in the execution of the trust and that nothing will be due to the *cestuis que trust* until the termination of the life estate.<sup>6</sup> And a judgment creditor of the mortgagor will not be made a party defendant to a

<sup>1</sup> 61 Hun (N. Y.) 433 (1891); s. c. 16 N. Y. Supp. 267; 41 N. Y. S. R. 41.

<sup>2</sup> N. Y. Code Civ. Proc., § 1626.

<sup>3</sup> *Bigelow v. Davol*, 62 Hun (N. Y.) 245 (1891); s. c. 41 N. Y. S. R. 738; 16 N. Y. Supp. 646.

<sup>4</sup> In Iowa, however, in an action to foreclose a mortgage on a homestead,

the holder of a junior judgment is not a necessary party defendant. *Sutherland v. Tyner*, 72 Iowa 232 (1887); s. c. 33 N. W. Rep. 645.

<sup>5</sup> *Thompson v. Huron Lumber Co.*, 4 Wash. 600 (1892); s. c. 30 Pac. Rep. 741.

<sup>6</sup> *Wolfe v. Jaffray*, 88 Iowa 358 (1893); s. c. 55 N. W. Rep. 91.

mortgage foreclosure, for the purpose only of alleging collusion between the mortgagor and mortgagee to defraud creditors and the invalidity of the mortgages, and not to enforce the judgment lien or share in the proceeds of sale.<sup>1</sup> But where there has been a conveyance of real property in consideration of the agreement of the grantees to care for the grantor during the remainder of his life, to secure the performance of which a mortgage upon the property is executed to the grantor, when made in good faith, divests the title; and a subsequent judgment creditor of the grantor has no interest in the foreclosure of the mortgage, which has been assigned by the grantor.<sup>2</sup>

§ 164. Judgment creditors—Remedies if omitted as defendants.—It has been said that in a suit to foreclose a mortgage given by a corporation on all of its assets, an unsecured creditor who had obtained judgment since the execution of the mortgage has a right to become a party defendant by petition.<sup>3</sup>

§ 166. Subsequent lienors.—In those cases where one is made defendant in foreclosure on the ground that he claims some interest in or lien upon the premises, which accrued subsequently to the mortgage, may by his answer set up a paramount claim which may be tried and adjudged, unless plaintiff discontinues as to him.<sup>4</sup>

§ 166a. Same—Lienors, holders of any kind—Terre-tenants.—The supreme court of Pennsylvania, in the case of *Hulett v. New York Mutual Life Insurance Company*,<sup>5</sup> say that in a *scire facias* on a mortgage or judgment, a terre-tenant is one who became seized or possessed of the debtor's land, subject to the lien thereof.

<sup>1</sup> *Bruce v. Nicholson*, 109 N. C. 202 (1891); s. c. 26 Am. St. Rep. 562; 13 S. E. Rep. 790.

<sup>2</sup> *Chandler v. Whitely* (Mich. 1894), 53 N. W. Rep. 1011.

<sup>3</sup> *Moon v. Wellford*, 84 Va. 34 (1887); s. c. 4 S. E. Rep. 572.

<sup>4</sup> *Lego v. Medley*, 79 Wis. 211 (1891); s. c. 48 N. W. Rep. 375.

<sup>5</sup> 114 Pa. St. 142 (1886); s. c. 6 Atl. Rep. 554; 4 Cent. Rep. 767.

§ 176. Purchasers at tax sales, boards of supervisors, state comptrollers and municipal corporations, defendants.—It has recently been held by the United States circuit court for the district of Kansas that a purchaser at a tax sale is a proper, if not a necessary, party to a bill to foreclose a mortgage upon the property;<sup>1</sup> but a tax title is not affected by foreclosure and sale under a mortgage, where the holder is not made a party to the foreclosure suit.<sup>2</sup>

The United States supreme court, in the case of *Hefner v. Northwestern Mutual Life Insurance Company*,<sup>3</sup> say that in a case where the title to land was in the mortgagor at the date of the mortgage, and a tax title was subsequent in time, although paramount in right to the title acquired under mortgage foreclosure, upon foreclosure of the mortgage in equity the court could determine the validity of the tax title; and the owner of such title was a proper, if not necessary, party to foreclosure.

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<sup>1</sup> *Cohen v. Solomon*, 66 Fed. Rep. (1892); s. c. 49 N. Y. S. R. 26; 32 N. E. Rep. 740.

411 (1895).

<sup>2</sup> *Chard v. Holt*, 136 N. Y. 30 (1887); 123 U. S. 747 (1887); bk. 31 L. ed. 309; s. c. 8 Sup. Ct. Rep. 337.



## CHAPTER VIII.

### PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE

**PARTIES HOLDING PART OR EQUITABLE INTERESTS IN THE MORTGAGE UNDER FORECLOSURE, OR IN LIENS CONTEMPORARY THEREWITH, NOT JOINING AS PLAINTIFFS, NECESSARY DEFENDANTS.**

§ 177. Introductory.

182. Assignee of a mortgage assigned collaterally, a necessary defendant in foreclosure by the assignor.

§ 186. Trustees and beneficiaries sometimes necessary defendants.

§ 177. Introductory.—It is said by the supreme court of Iowa, in the case of *Kennedy v. Moore*,<sup>1</sup> that a mortgagor and maker of a promissory note secured by the mortgage is entitled to have the mortgagee and payee of the note made a party defendant to an action by another for judgment on the note and for the foreclosure of the mortgage, where the plaintiff claims title to the mortgage and the note under an oral assignment, which title is disputed by such mortgagee and payee. In those cases where the judgment and all proceedings in a foreclosure suit, commenced after the death of the mortgagor, against such mortgagor, to which neither his heirs nor personal representatives are made parties, the proceedings are void as against the heirs of the mortgagor.<sup>2</sup>

§ 182. Assignee of a mortgage assigned collaterally, a necessary defendant in foreclosure by the assignor.—The supreme court of Michigan, in the case of the *Michigan State bank of Eaton Rapids v. Trowbridge*,<sup>3</sup> say that a mortgagee and another who have indorsed the note accompanying the mortgage as additional security, under an

<sup>1</sup> 91 Iowa 39 (1894); s. c. 58 N. W. Rep. 1066.

<sup>2</sup> *Craven v. Bradley*, 51 Kan. 336 (1893); s. c. 32 Pac. Rep. 1112.

<sup>3</sup> 92 Mich. 217 (1892); s. c. 52 N. W. Rep. 632.

agreement to that effect, may be made defendants, and the deficiency judgment obtained against them, by one to whom the mortgage and note have been assigned as collateral security, under the Michigan statute<sup>1</sup> providing for the joinder, with the mortgagor as defendants, of any and all persons who have secured the debt by an obligation or other evidence of debt.

§ 186. **Trustees and beneficiaries sometimes necessary defendants.**—The supreme court of Missouri, in the case of *Williams v. Brownlee*,<sup>2</sup> say that where, between the giving of a mortgage to a county to secure school moneys borrowed to pay the purchase price of swamp lands purchased from the county, and the execution of a deed of such lands to the purchaser by the county commissioner, the purchaser executed a deed of trust of the land to secure a debt to another, a failure to make the grantee in the trust deed a party to a foreclosure of the mortgage will have no other effect than to allow those claiming under the trust deed to redeem, and constitutes no defense to an action of ejectment brought by the county, which purchased at the foreclosure sale.

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<sup>1</sup> How. Mich. Stat., § 6704.

<sup>2</sup> 101 Mo. 309 (1890); s. c. 13 S.W. Rep. 1049.

## CHAPTER IX.

### PARTIES DEFENDANT.

#### PRIOR MORTGAGEES AND ADVERSE CLAIMANTS.

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| <p>§ 188. When prior mortgagees and lienors cannot be made defendants.</p> <p>190. When prior mortgagees and lienors may be made defendants.</p> <p>191. Parties having a title paramount to the mortgage, neither proper nor necessary defendants.</p> | <p>§ 192. Adverse claimants neither proper nor necessary defendants.</p> <p>193. Senior mortgagees or incumbrancers, claimed to be junior lienors, proper defendants for litigating questions of priority.</p> |
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§ 188. When prior mortgagees and lienors cannot be made defendants.—In suits to foreclose mortgages upon real estate, prior lien-holders are not necessary parties defendant;<sup>1</sup> and where a prior mortgagee is made a party defendant to an action to foreclose a subsequent mortgage, he may ask to be dismissed with his costs,<sup>2</sup> but should the prior incumbrancer, instead of asking to be dismissed, consent to a sale, and to take his principal and interest out of the receipts, he must, as he thereby adopts the suit and takes the benefit of it, contribute to the costs; and for this reason the costs of all parties will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest.<sup>3</sup>

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<sup>1</sup> Crawford v. Mumford, 29 Ill. App. 445; Foster v. Johnson, 44 Minn. 290 (1890); s. c. 46 N. W. Rep. 350; Stratton v. Reisdorph, 35 Neb. 314 (1892); s. c. 53 N. W. Rep. 136; Lambertville Nat. Bank v. McCready Bag & Paper Co. (N. J. Ch. 1883), 15 Atl. Rep. 388; s. c. 13 Cent. Rep. 388; 1 L. R. A. 334; Scott v. Somers (N. J. Ch. 1887), 9 Atl. Rep. 718; s. c. 3 Cent. Rep. 564; Hague v. Jackson, 7

Tex. 761 (1888); s. c. 12 S. W. Rep. 63.

<sup>2</sup> Scott v. Somers (N. J. Ch. 1887), 9 Atl. Rep. 718; s. c. 8 Cent. Rep. 564; Daniell Ch. Pl. & Pr. 1390.

<sup>3</sup> Scott v. Somers (N. J. Ch. 1887), 9 Atl. Rep. 718; s. c. 8 Cent. Rep. 564; Scattergood v. Keeley, 40 N. J. Eq. (13 Stew.) 491 (1885); Daniell Ch. Pl. & Pr. 1390.

The supreme court of Minnesota, in *Foster v. Johnson*,<sup>1</sup> say that a prior mortgagee is not a proper party to a foreclosure suit by a subsequent mortgagee, but he may be made a party if there is a dispute in respect to their relative rights, which may be settled in such suit, and the proper decree entered for a foreclosure sale or redemption; and the New Jersey court of chancery say that the bondholders under a trust mortgage given to secure their bonds, are not necessary parties to a suit to foreclose a second mortgage, when the holder of the trust mortgage, which is a first lien, is made a party defendant.<sup>2</sup>

In a case in New York where in the foreclosure of a junior mortgage a senior mortgagee was made a party defendant, and answer set up facts essential to foreclose its mortgage, and demanded judgment. The referee directed judgment of foreclosure of both mortgages, with a provision that the property embraced in the junior mortgage be sold as an entirety, subject to said senior mortgage, and that unless the purchaser should pay the amount secured by the latter, with costs, the property covered by it should be sold separately to pay off the amount due, with costs. The court held that the plaintiff was at liberty to make the senior mortgagee a party defendant; that the claim of the senior mortgagee came within the New York Code<sup>3</sup> defining counterclaim; that the practice observed and the judgment rendered did not contravene the statute providing for the foreclosure of mortgages by action and sale of premises pursuant to judgment therein.<sup>4</sup>

§ 190. When prior mortgagees and lienors may be made defendants.—In a suit to foreclose a mortgage a prior mortgagee is a proper party defendant;<sup>5</sup> and when made a party he has a right to file and maintain a cross-bill

<sup>1</sup> 44 Minn. 290 (1890); s. c. 49 N. W. Rep. 390.

<sup>2</sup> *Lambertville National Bank v. McCready Bag & Paper Co.* (N. J. Chan. 1888), 15 Atl. Rep. 388; 13 Cent. Rep. 388; 1 L. R. A. 334.

<sup>3</sup> N. Y. Code Civ. Proc., § 501.

<sup>4</sup> *Metropolitan Trust Co. v. Tona-wanda Valley & C. R. Co.*, 106 N. Y. 673 (1887); s. c. 13 N. E. Rep. 933; 8 Cent. Rep. 781; affg. s. c. 43 Hun (N. Y.) 521.

<sup>5</sup> *Guilford v. Jacobie*, 69 Hun (N. Y.) 420 (1893); s. c. 23 N. Y. Supp.

for the purpose of having the lien of his mortgage enforced, and procuring a determination of any question concerning its priority or validity that can arise and be litigated between himself and any or all of the parties to the original bill.<sup>1</sup> In those cases where a prior mortgagee is made a party to the foreclosure of a subsequent mortgage, and he does not answer or demur, he is bound by the judgment rendered therein, directing payment of his mortgage out of the first proceeds, and cannot maintain an action for foreclosure of his mortgage.<sup>2</sup> The New Jersey courts hold that the personal representatives of the deceased assignee of a prior undischarged trust mortgage are proper parties defendant to a suit to foreclose a second mortgage.<sup>3</sup>

§ 191. Parties having a title paramount to the mortgage, neither proper nor necessary defendants.—It is a well settled rule that the determination of the rights in the property mortgaged, as between adverse legal claimants, is not proper in a foreclosure suit.<sup>4</sup> Hence it has been held

462; 52 N. Y. S. R. 837; *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.*, 43 Hun (N. Y.) 521 (1887); *affd.* 106 N. Y. 673; *Jacobie v. Mickle*, 24 N. Y. Supp. 87 (1893); s. c. 53 N. Y. S. R. 620; *First National Bank of Salem v. Salem Capital Flour Mills Co.*, 31 Fed. Rep. 580 (1887).

A second mortgagee may properly make the prior mortgagee a party defendant, where his mortgage is past due, and as to the amount of which there is no controversy, and have the amount of such mortgage determined and paid out of the proceeds of the sale and its lien discharged. *Guilford v. Jacobie*, 69 Hun (N. Y.) 420 (1893); s. c. 52 N. Y. S. R. 837; 23 N. Y. Supp. 462.

Thus it has been said that in an action to foreclose a mortgage given by a railroad company, senior incumbrancers may be made parties defendant; and where their claims

embrace a cause of action, both against the plaintiff and against some of their co-defendants, and are connected with the subject of the action, their answers must set up their claims as counterclaims, and demand affirmative relief. *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.*, 43 Hun (N. Y.) 521 (1887); *affd.* 106 N. Y. 673.

<sup>1</sup> *First National Bank of Salem v. Salem Capital Flour Mills Co.*, 31 Fed. Rep. 580 (1887).

<sup>2</sup> *Jacobie v. Mickle*, 53 N. Y. S. R. 620 (1893); s. c. 24 N. Y. Supp. 87.

<sup>3</sup> *Lambertville National Bank v. McCready Bag & Paper Co.* (N. J. Chan. 1888), 15 Atl. Rep. 388; s. c. 13 Cent. Rep. 388; 1 L. R. A. 334.

<sup>4</sup> *Davis v. Hamilton*, 53 Ill. App. 94 (1893); See. *Hambrick v. Russell*, 86 Ala. 199 (1889); s. c. 5 So. Rep. 298; *Randall v. Duff*, 79 Cal. 115 (1889); s. c. 21 Pac. Rep. 610; 3 L.

that on a bill to foreclose a mortgage, one who claims title from a stranger, or even from the mortgagor anterior to the date of the mortgage, cannot be brought in as a party defendant to litigate his title.<sup>1</sup>

It has been said the rule that one claiming mortgaged property by a paramount and hostile title need not be made a party to proceedings to foreclose the mortgage applies only where such title is paramount to the claim of both mortgagor and mortgagee.<sup>2</sup> The general rule is that questions as to whether a defendant in a foreclosure suit has rights paramount and adverse to the plaintiff are not questions of jurisdiction over the parties or subject-matter; and any irregularity in the investigation and adjudication of such questions may be waived by failing to make objection at the proper time, in which case the court has the right to pass upon the questions.<sup>3</sup>

§ 192. Adverse claimants neither proper nor necessary defendants.—The supreme court of South Carolina, in the case of *Hunt v. Nolen*,<sup>4</sup> say the rule that adverse claimants are not to be made parties to a foreclosure suit for the purpose of litigating their title, as between defendants, does not apply where the interest of the claimant to a portion of the mortgaged premises is not certainly known to any party to the proceedings, and it is assumed only that he has no more than a life estate in the lands, from the fact that a trust deed conveyed only a life estate to the persons under whom he is supposed to have derived

R. A. 756; *Dickerson v. Uhl*, 71 Mich. 398 (1888); s. c. 39 N. W. Rep. 472; *Cromwell v. MacLean*, 123 N. Y. 474 (1890); s. c. 25 N. E. Rep. 932; 34 N. Y. S. R. 85.

<sup>1</sup> *Hambrick v. Russell*, 86 Ala. 199 (1889); s. c. 5 So. Rep. 298; *Dickerson v. Uhl*, 71 Mich. 398 (1888); s. c. 39 N. W. Rep. 472.

Objection against bringing into a foreclosure suit the claimant of an adverse legal title is not one of multifariousness, but of jurisdiction as

to the subject-matter, and may be raised at any time, or enforced by the court *sua sponte* without formal suggestion. *Hambrick v. Russell*, 86 Ala. 199 (1889); s. c. 5 So. Rep. 298.

<sup>2</sup> *Randall v. Duff*, 79 Cal. 115 (1889); s. c. 21 Pac. Rep. 610; 3 L. R. A. 756.

<sup>3</sup> *Cromwell v. MacLean*, 123 N. Y. 474 (1890); s. c. 34 N. Y. S. R. 85; 25 N. E. Rep. 932.

<sup>4</sup> 40 S. C. 284 (1893); s. c. 18 S. E. Rep. 798.



title, and the mortgage was given by the defendant for the purchase price of the premises, and such claimant has been in possession of a portion thereof ever since the purchase. But the supreme court of Kansas, in the case of *Fisher v. Cowles*,<sup>1</sup> hold that the question of adverse and paramount title may be litigated in an action to foreclose a mortgage.

§ 193. Senior mortgagees or incumbrancers, claimed to be junior lienors, proper defendants for litigating questions of priority.—The Illinois court of appeals, in the case of *Foval v. Benton*,<sup>2</sup> say that a mortgagee of lands who is made a party defendant in an action to foreclose a subsequent mortgage, under an allegation that her interest, if any, has accrued subsequent to the lien of plaintiff's mortgage, is not bound to set up her prior incumbrance under such action, for the reason her rights are not affected by a decree therein.

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<sup>1</sup> 41 Kan. 418 (1889); s. c. 21 Pac. Rep. 228.

48 Ill. App. 638 (1892).

## CHAPTER X.

### PARTIES DEFENDANT—LIABLE FOR THE MORTGAGE DEBT. PARTIES ORIGINALLY LIABLE.

§ 213. Persons originally liable, deceased, their estates liable—Personal representatives proper parties.

§ 215. Persons originally liable, deceased, their heirs and devisees proper parties.

§ 213. Persons originally liable, deceased, their estates liable—Personal Representatives Proper Parties.—The court of chancery of New Jersey, in the case of *United Security Life Insurance and Trust Company of Pennsylvania v. Vandergrift's Administrator*,<sup>1</sup> hold that while an administrator is not a necessary party to a suit to foreclose a mortgage on the lands of his intestate, yet according to the general current of authority in that State, he is a proper party. Vice-Chancellor Van Fleet, in writing the opinion of the court, says: "In *Vreeland v. Loubat*,<sup>2</sup> and in *Chester v. King*,<sup>3</sup> Governor Pennington held that, while a mortgagor, who had conveyed his equity of redemption in the mortgaged premises, was not a necessary party to a suit to foreclose the mortgage on the land, he was nevertheless a proper party. And in *Andrews v. Stelle*,<sup>4</sup> it was held by the court of errors and appeals, speaking by Mr. Justice Van Syckel, that while a mortgagor, whose equity of redemption had been sold away from him, was not a necessary party to a suit to foreclose the mortgage on the land, yet, if the complainant made him a party, and he claimed that the mortgage was usurious, to avail himself of that defense he must make it in the foreclosure suit, otherwise he would be concluded by the decree made

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<sup>1</sup> 26 Atl. Rep. 985 (1893).

<sup>2</sup> 2 N. J. Eq. (1 H. W. Gr.), 405

<sup>3</sup> 2 N. J. Eq. (1 H. W. Gr.), 104 (1841).

(1838).

<sup>4</sup> 22 N. J. Eq. (7 C. E. Gr.), 478

(1136)

(1871).

in that suit, and, if a suit should subsequently be brought on his land, he would be held to be estopped by the decree in the foreclosure suit from setting up that defense. In *Somerset County Building and Loan Association v. Vandevere*,<sup>1</sup> Chancellor Williamson intimated quite plainly that he thought to a suit to foreclose a mortgage against the heir of the deceased mortgagor, the personal representative of the deceased mortgagor was a necessary party, because he is interested in taking an account of what is due on his intestate's land; and it is quite apparent that the Chancellor would so have declared if the question had been a new one, and not settled, in principle at least, by the decision in *Vreeland v. Loubat*.<sup>2</sup> But no doubt can be entertained that the interest which such personal representative has in being present when the account is taken of the amount remaining due on his intestate bond, in order that he may see that all proper credits are given, and the sum remaining due is fairly and correctly ascertained, is quite sufficient to make him a proper party. And there is this advantage to the complainants in making him a party: While no direct or active relief can be awarded against him, he will nevertheless be concluded by the decree as to the amount due; and, if a suit at law or other proceeding should afterwards be necessary to recover the whole amount due on the bond, the amount so recoverable will be considered, after the proceeds of sale of the mortgaged premises have been credited, as having been unalterably determined by the decree in the foreclosure suit."<sup>3</sup>

§ 215. **Persons originally liable, deceased, their heirs and devisees proper parties.**—While the second edition of this work was passing through the press a decision was rendered by the Supreme Court of the State of New York which requires that the rule as heretofore laid down, should

<sup>1</sup> 11 N. J. Eq. (3 Stock.), 382, 383 (1857.)

<sup>2</sup> 2 N. J. Eq. (1 H. W. Gr.), 104 (1838.)

<sup>3</sup> The court cite: *Dorsheimer v.*

*Rorback*, 23 N. J. Eq. (8 C. E. Gr.), 46, 48 (1872); s. c. on appeal 25 N.

J. Eq. (10 C. E. Gr.), 516, 519 (1874), and *Andrews v. Stelle*, 22 N. J. Eq.

(7 C. E. Gr.), 478 (1871).

be modified, if not changed entirely. At the time when the second edition of this work was published the decisions were not uniform upon the question discussed in this section, and Mr. Wiltsie simply stated the practice as he found it in the reports cited. In the case above referred to, the Supreme court of New York held that the mortgagee may pursue the estate of the mortgagor into the hands of heirs and devisees for the purpose of making a deficiency judgment. It follows as a necessary consequence that if heirs and devisees of a mortgagor are liable to the amount of the property and money received on any judgment for deficiency rendered on a mortgage foreclosure, they are not only proper but necessary parties in such foreclosure. It is said in the case of *Colgan v. Dunne*,<sup>1</sup> that there is "a right to pursue the legatee for the debt of the testator, exists independent of statute, courts of law and courts of equity have, from the earliest times, sustained the creditor's right to satisfaction of his debt from the assets of the creditor in the hands of the legatee."<sup>2</sup> The theory is that the testator cannot cut off the right of his creditor to satisfaction of the debt from the testator's estate. In form the action is against the legatee; in substance it is against the property of the testator in the defendant's hands. The statute regulates the procedure, but does not create the right."<sup>3</sup>

<sup>1</sup> 50 Hun (N. Y.), 443 (1888); s. c. 3 N. Y. Supp. 309; 21 N. Y. S. R. 315.

<sup>2</sup> Citing: Bract. bk. 2, c. 26, f. 61; 2 Bl. Com. c. 36; 6 Bac. Abr. "Legacies," h; 2 Redf. on Wills §56; 1 Wash. Real. Prop. c. 3, § 73; Wal-kins v. Holmann, 41 U. S. (16 Pet.) 25 (1842); bk. 10, L. Ed. 873;

*Nelthrop v. Hill*, 1 Ch. Cas. 135 (1650); *Newman v. Barton*, 2 Vern. 205 (1690); *Noel v. Robinson*, 1 Vern., 90, 94 (1682).

<sup>3</sup> *Colgan v. Dunne*, 50 Hun (N. Y.), 443 (1888); s. c. 3 N. Y. Supp. 309; 21 N. Y. S. R. 315.

## CHAPTER XI.

### PARTIES DEFENDANT—LIABLE FOR THE MORTGAGE DEBT— PARTIES SUBSEQUENTLY LIABLE.

§ 218. Introductory.

222. Purchaser of mortgaged premises, assuming payment of mortgage, liable—General principles.

§ 230. Grantor cannot release his grantee, assuming a mortgage, from his liability to the mortgagee in New York.

§ 218. Introductory.—The court of appeals of Illinois say that it is only by virtue of an express provision of the statute, or facts giving equitable jurisdiction, that a third person liable for the mortgage debt can be joined as a party defendant in a foreclosure proceedings;<sup>1</sup> and the supreme court of Michigan, in the case of *Windsor v. Ludington*,<sup>2</sup> say that under the Michigan statute,<sup>3</sup> providing that if the mortgage deed be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill for foreclosure and the court may decree payment of the balance remaining unsatisfied, as well as against such other person as the mortgagor, etc., does not apply to the holder of an attachment lien on the mortgaged premises who has agreed to purchase the mortgage.

§ 222. Purchaser of mortgaged premises, assuming payment of mortgage, liable—General principles.—The general rule is that where a deed executed by the grantor contains a clause which sufficiently shows an intention on the part of the grantee to assume liability of paying a mortgage on premises, the acceptance of such deed consummates a personal liability on his part which inures to the benefit of the mortgagee. Thus it is said by the New York court of appeals, in the case of *Gifford v. Corrigan*,<sup>4</sup> that

<sup>1</sup> *Walsh v. Van Horn*, 22 Ill. App. 170 (1886).

<sup>2</sup> 77 Mich. 215 (1889); s. c. 43 N. W. Rep. 866.

<sup>3</sup> How. Mich. Stat. § 6704.

<sup>4</sup> 117 N. Y. 257 (1889); s. c. 22 N. E. Rep. 756; 6 L. R. A. 610. (1139)

the acceptance of a deed containing an express assumption by the grantee of a mortgage, creates an obligation which the grantor cannot release;<sup>1</sup> and the mortgagee may maintain a personal action against such a grantee, and he may also pursue this remedy without foreclosing the mortgage and without joining the mortgagor as a defendant in the proceedings.<sup>2</sup> In such a case, it is simply a question of a promise on the part of one person to another to pay a debt due to a third; and the right of the third person to recover from the promisor for such debt is well settled;<sup>3</sup> and this is true whether the promise is verbal or in writing.<sup>4</sup> But it has been said that, in order to constitute a personal obligation upon a party taking a conveyance of land incumbered by a mortgage binding him to the absolute payment thereof, something more is requisite than a mere statement in the deed that the conveyance is made subject to such mortgage;<sup>5</sup> thus, it has been held that a recital in a deed to the effect that the land is subject to a mortgage, the amount due thereon being part thereof and deducted from the consideration, without stating that the grantee assumes payment of the mortgage, does not render such grantee personally liable for a deficiency on foreclosure.<sup>6</sup> Yet it is held by some cases that where, by the terms of the deed,

<sup>1</sup> As to the binding obligation of the assumption by the mortgagee.

See: *Atlantic Dry Dock Co. v. Leavitt*, 54 N. Y. 35 (1873); *Ricard v. Sanderson*, 41 N. Y. 179 (1869); *Spaulding v. Hallenbeck*, 35 N. Y. 204 (1866); *Trotter v. Hughes*, 12 N. Y. 74 (1854); *Halsey v. Reed*, 9 Paige Ch. (N. Y.), 446 (1842); *Converse v. Cook*, 8 Vt. 164 (1836).

<sup>2</sup> *Burr v. Beers*, 24 N. Y. 173, 179 (1861); *Belmont v. Coman*, 22 N. Y. 433 (1860); *Vail v. Foster*, 4 N. Y. 312 (1850); *Marsh v. Pike*, 10 Paige Ch. (N. Y.), 595 (1844); *King v. Whitley*, 10 Paige Ch. (N. Y.), 465, 469 (1843); *Biyer v. Monholland*, 2 Sandf. Ch. (N. Y.), 478 (1845).

<sup>3</sup> *Rogers L. & M. Works v. Kelley*, 88 N. Y. 234 (1882); *Lawrence v. Fox*, 20 N. Y. 268 (1859); *Knowles v. Erwin*, 43 Hun (N. Y.), 150, 152 (1887).

<sup>4</sup> *Bowen v. Kurtz*, 37 Iowa 239 (1873); *Drury v. Tremont Improvement Co.*, 95 Mass. (13 Allen) 168 (1866); *Strohauer v. Voltz*, 42 Mich. 444 (1880); s. c. 4 N. W. Rep. 161; *Bolles v. Beach*, 22 N. J. 2 L.(Zab.), 680 (1850).

<sup>5</sup> *Stebbins v. Hall*, 29 Barb (N. Y.), 524, 530 (1859).

<sup>6</sup> *Equitable Loan and Assurance Soc. v. Bostwick*, 100 N. Y. 628 (1885); s. c. 3 N. E. Rep. 296; 1 Cent. Rep. 523.



the vendee is to pay the mortgage, and the amount thereof is deducted from the consideration money, as between the vendee and the mortgagor, in equity, the vendee is personally liable for any deficiency that may arise on a foreclosure sale.<sup>1</sup>

§ 230. Grantor cannot release his grantee, assuming a mortgage, from his liability to the mortgagee in New York.—The court of appeals of New York say, in the case of *Gifford v. Corrigan*,<sup>2</sup> that a release of a grantee by the grantor from a covenant in the deed assuming an outstanding mortgage on the premises, cannot prejudice the mortgagee's rights to hold the grantee as a debtor, particularly in those cases where the creditor has already learned of the grantee's promise and has assented to and adopted it. In the course of the opinion, Judge Finch says: "Is this release, thus executed, a defense to this action? I shall not undertake to decide, if, indeed, the question is open,<sup>3</sup> whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee, it was or was not revocable, without his assent. However that may be, the only inquiry now presented is whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it, and adopted it as a security for his own benefit. My judgment leads me to answer that question in the negative. Of course, it is difficult, if not impossible, to reason about it without recurring to *Lawrence v. Fox*,<sup>4</sup> and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and

<sup>1</sup> *Gilbert v. Averill*, 15 Barb. (N. Y.) 20, 23 (1853); *Ferris v. Crawford*, 2 Den. (N. Y.) 595 (1845); *Tice v. Annin*, 2 John. Ch. (N. Y.) 125, 128 (1816); *Vanderkemp v. Shelton*, 11 Paige Ch. (N. Y.) 28 (1844); *King v. Whitely*, 10 Paige Ch. (N. Y.) 465 (1843); *Jumel v. Jumel*, 7 Paige Ch. (N. Y.) 591 (1839); *Heyer v. Pruyn*,

7 Paige Ch. (N. Y.) 465 (1839); *Bigelow v. Bush*, 6 Paige Ch. (N. Y.) 343 (1837).

<sup>2</sup> 117 N. Y. 257 (1889), s. c. 22 N. E. Rep. 756; 6 L. R. A. 610.

<sup>3</sup> *Knickerbocker Ins. Co. v. Nelson*, 78 N. Y. 137 (1879); *Cemely v. Dazian*, 114 N. Y. 167 (1889).

<sup>4</sup> 20 N. Y. 268 (1859).

variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted it, and adopted it, and in some manner acted upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and therefore he might sue upon it, although privy neither to the contract nor its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge, and that he has assented to and acted upon it; for he may sue. That is decided, and is conceded. If he may sue he must at that moment have a vested right of action. If it was not obtained earlier, it must have vested in him at the moment when his action was commenced; so that the right and the remedy were born at the same instant. But there is no especial magic in a lawsuit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff; that the latter has accepted and adopted it; that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act, in reliance upon it. But, if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it, and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion.

“ But two of the judges who concurred in the decision of

Lawrence v. Fox stood upon a different proposition. They held that the mortgagor granting the land accepted the grantee's covenant as agent of the mortgagee, who might ratify the act with the same effect as if he had originally authorized it. While I think the idea of such an agency is a legal fiction, having no warrant in the facts, yet the same result as to the power of revocation follows. While the agency remained unauthorized it might be possible to change the transaction, but after the ratification the promise necessarily becomes one made to the mortgagee through his agent, the mortgagor, acting lawfully in his behalf, and from that moment cannot be altered or released without his sanction and consent.

"But another basis for the action has been asserted, applicable, however, only to cases like the present, where, on foreclosure of the mortgage, its owner seeks a judgment for a deficiency against the new covenantor.

"In Burr v. Beers,<sup>1</sup> and again in Garnsey v. Rogers,<sup>2</sup> it was pointed out that the liability of the grantee to the mortgagee rested upon the equitable right of subrogation, and had been recognized and enforced long before Lawrence v. Fox made its appearance. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might in equity be subrogated to the right of his debtor, and, under the statute permitting any person liable for the mortgage debt to be made defendant, and charged with a deficiency in the foreclosure, the new covenant became available to the mortgagee. It was so held in Halsey v. Reed,<sup>3</sup> and the right of the mortgagee was put upon the equity of the statute. That, if a sound proposition, was all very well, so long as there was supposed to be no equivalent remedy at law; but after the decision of Lawrence v. Fox, that remedy existed.

"And so, in Thorp v. Keokuk Coal Company,<sup>4</sup> the court

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<sup>1</sup> 24 N. Y. 173, 179 (1861).

<sup>2</sup> 9 Paige Ch. (N. Y.) 446 (1842).

<sup>3</sup> 47 N. Y. 233, 242 (1872).

<sup>4</sup> 48 N. Y. 253, 258 (1872).

said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed in a broader equity the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake. And so, I think, the suggestion is well founded. But if I am wrong about that, as perhaps I may prove to be, and the right of the present plaintiff against the cardinal's estate does stand upon the doctrine of equitable subrogation, still I think the same result follows. When does that equitable right arise, and become vested in the creditor? It would seem that it must be when the situation is created out of which the equity is born. If it be possible to adjourn it to a later period, it must certainly attach when the creditor asserts his right to it, and notifies the other party of his intention to rely upon it. As a right founded upon the equity of the statute, it must have come into being before the foreclosure suit was commenced; for the permission reads: 'Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action.' His liability must precede the commencement of the action. It must exist as a condition of his being sued at all. And so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or at the latest, when the promise came to the knowledge of the creditor, and he assented to and adopted it."

## CHAPTER XII.

### COMMENCEMENT OF ACTION.

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| <p>239. How brought—Requisites of summons.</p> <p>243. Requisites of affidavit to secure order for service of summons by publication.</p> <p>248. Service of summons on infant defendants.</p> <p>253. Commencement of foreclosure prevents action at law on bond.</p> <p>255. Tender after suit brought.</p> <p>256. What claims may be foreclosed.</p> <p>256a. Same—Amount due.</p> <p>256b. Same—Mortgage on charitable institutions.</p> <p>256c. Same—Mortgage by church corporation.</p> <p>256d. Same—Mortgage assigned as collateral security.</p> <p>256e. Same—Death of mortgagor—Presentation of claims.</p> <p>256f. Same—Defective and mutilated mortgages.</p> <p>256g. Same—Mortgage on homestead.</p> <p>256h. Same—Indemnity mortgages.</p> <p>256i. Same—Lost mortgages or notes.</p> <p>256j. Same—Other securities.</p> <p>256k. Same—Mortgage on partnership property.</p> <p>256l. Same—Mortgage on undivided interest—Partition.</p> <p>256m. Same—Mortgage with power of sale.</p> <p>256n. Same—Prior sale on superior lien.</p> <p>256o. Same—Release of mortgagor from personal liability.</p> <p>256p. Same—Riparian mortgages.</p> <p>256q. Same—Six months' clause.</p> <p>256r. Same—Wrongful discharge.</p> | <p>§ 256s. What claims can not be foreclosed.</p> <p>256t. Same—Attachment returned—Exhausting legal remedy.</p> <p>256u. Same—Fraud in mortgage prevents foreclosure.</p> <p>256v. Same—Inequitable or oppressive claims.</p> <p>256w. Same—Invalid mortgage.</p> <p>256x. Same—Same—Mortgage on ward's lands.</p> <p>256y. Same—Interest paid.</p> <p>257. Removed fixtures.</p> <p>257a. Same—From leasehold—Following property.</p> <p>257b. Right to cut timber.</p> <p>258. Doctrine of merger.</p> <p>262a. Mortgages upon separate pieces of property for the same debt—One instrument is when.</p> <p>263. Where mortgagee has lien on personal property sufficient to pay debt.</p> <p>264. Mortgage with power of sale.</p> <p>264a. Same—Void under statute.</p> <p>264b. Same—Who may execute power—Where naked power.</p> <p>264c. Same—Same—Where coupled with an interest.</p> <p>264d. Same—When sale to be made.</p> <p>264e. Same—Notice of sale.</p> <p>264f. Same—Duty of person making the sale.</p> <p>264g. Same—Possession not necessary to execution of.</p> <p>264h. Same—Sale must be in strict accordance with power.</p> <p>264i. Same—Valid exercise of power.</p> |
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| <p>§ 264j. Same—Who may purchase.<br/>         264k. Same—Rights of purchasers.<br/>         264l. Same—Deed on sale.<br/>         264m. Same—Void and voidable sales.<br/>         264n. Same—Revoked by death.<br/>         264o. Same—Avoiding or setting aside power.<br/>         265. Breach of payment of installment—Accelerated maturity of debt.</p> | <p>§ 266. Failure to pay installment of principal.<br/>         267. Failure to pay installment of interest.<br/>         267a. Same—Stay of foreclosure.<br/>         271. Junior mortgagee cannot compel foreclosure by senior mortgagee.<br/>         272. Joinder of actions.<br/>         273. Consolidation of actions.</p> |
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§ 239. How brought—Requisites of summons.—Under the Georgia code,<sup>1</sup> in an action to foreclose a mortgage, the service must be personal or by publication, and service of the rule *nisi* to foreclose a mortgage by leaving a copy of it in the most notorious place of abode of the defendant, there being no personal service, is not sufficient.<sup>2</sup> But the fact that a defendant is not correctly named in the original notice for foreclosure does not relieve him from the duty to respond to the notice and plead.<sup>3</sup>

It is said by the supreme court of errors of Connecticut that each bondholder whose bonds are secured by a mortgage is, through the trustee and the majority of the bondholders, a party to the legislative and judicial proceedings accompanying the foreclosure; and actual individual notice is not required.<sup>4</sup> And in Louisiana it is said that the holder of a first mortgage, duly executed before a notary, with *pact de non alienando*, is not bound to give notice to any person but the debtor in possession. The fact that others had a junior mortgage by virtue of the same instrument makes no difference.<sup>5</sup>

§ 243. Requisites of affidavit to secure order for service of summons by publication.—In the recent case

<sup>1</sup> § 3962.

<sup>2</sup> Meeks v. Johnson, 75 Ga. 629 (1885); Dykes v. McClung, 74 Ga. 382 (1884). See: Ga. Code, § 3339.

<sup>3</sup> Lindsey v. Delano, 78 Iowa 350; s. c. 43 N. W. Rep. 218.

<sup>4</sup> Gates v. Boston & N. Y. A. L. R. Co., 53 Conn. 333 (1885); s. c. 5 Atl. Rep. 695; 1 N. Eng. Rep. 464.

<sup>5</sup> New Orleans Nat. Bkg. Assoc. v. Le Breton, 120 U. S. 765 (1887); Bk. 30 L. ed. 821.



of *Brenen v. North*,<sup>1</sup> it appears that on the action to foreclose it was sought to serve Thomas Brodie, whose whereabouts if he were alive, were unknown, by publication, and it was claimed on appeal that the affidavits upon which the order of publication was granted were insufficient to give jurisdiction. Those affidavits were made by the attorney for the plaintiff in that foreclosure suit, and by Ellen Brodie who was a sister of Thomas Brodie. The attorney swears that Thomas Brodie could not, after due diligence, be found in the State, and that the deponent had inquired from people who knew Thomas Brodie, and he was informed that he left New York seven years ago and never returned to their knowledge. Ellen Brodie swore that Thomas Brodie had left New York seven years before the time she made her affidavit, that she had never heard from him, that diligent inquiries had been made as to his whereabouts, and she was unable to get any information concerning him, and that, therefore, she believed he was not a resident of this State.

The court say: "The affidavits were sufficient to authorize the order of publication. There certainly was some evidence before the court that Thomas Brodie could not be served within the jurisdiction. The statement of due diligence in the efforts to serve him, as was remarked in *Kennedy v. The New York Life Insurance and Trust Company*,<sup>2</sup> is not necessarily an allegation of a conclusion of law, especially when considered in connection with the affidavit of the sister of Thomas Brodie, that her brother had left New York seven years previously, and she had never heard from him, and that she also had made diligent inquiry as to his whereabouts. The affidavit of the sister contains the statement that she was satisfied that her brother did not reside within the city and county of New York, and as stated before, the reasons for this belief were given. In *Carleton v. Carleton*<sup>3</sup> the affidavit for the publication of the summons stated that the defendant had not resided in the State of New York since March, 1877, and

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<sup>1</sup> 15 New York Law Journal (July 11, '96), No. 1024.

<sup>2</sup> 101 N. Y. 489.

<sup>3</sup> 23 Hun (N. Y.), 251 (1880).

there was a further allegation that the deponent is informed and believes that the defendant is a resident of San Francisco. That was held to be sufficient to give the court jurisdiction, and we think in this case where the service is attacked collaterally there was enough contained in the affidavit of the sister showing that the man had left New York seven years previously and had never been heard from thereafter by members of his own family, to justify the judge who made the order in determining that the defendant Thomas Brodie was not a resident of the State of New York and could not be found therein. It is further made to appear by the submitted statement, that when the summons was published pursuant to the order of publication against Thomas Brodie, the name of the first defendant Clark and the name of Thomas Brodie alone appeared as defendants, and as there were other defendants it is claimed that there was no proper publication. But there was a substantial compliance with the requirement of the law. The object of the summons was to give notice to the defendant Thomas Brodie that the action was pending against him; all that was necessary to give that notice was done, the name of the particular defendant summoned was given, the place at which his answer or notice of appearance must be served was mentioned in the publication. Whatever was requisite to put him upon inquiry was contained in the summons as printed and nothing more was necessary than that. A literal and exact copy was not required, if the whole of the summons specifically directed to him as a defendant and his name appearing therein as a defendant was published, as appears to have been the case here."

In the case of *Fulton v. Levy*,<sup>1</sup> the supreme court of Nebraska hold that in an action to foreclose a mortgage of real estate, where service upon the defendants by publication is desired, an affidavit in the following form is sufficient: "Byron Reed, being first duly sworn, says he is the agent for the plaintiff in the above entitled action, who is now

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<sup>1</sup> 21 Neb. 478 (1887); s. c. 32 N. W. Rep. 307.

absent from said Douglas County; that on the twenty-ninth day of August, 1876, the said plaintiff commenced his civil action in said district court for Douglas County, Nebraska, by filing his petition against the defendants above named, praying that certain lands situate in Douglas County, and in said petition particularly described, may be decreed to be sold to satisfy certain mortgages given by the said Emma Williams to said plaintiff, to secure the payment of a certain sum of money therein named, and the same Emma Williams has since conveyed the said premises to the said Eliza Whalen; and the affiant further says that the service of a summons cannot be made upon the said Emma Williams and Eliza Whalen within said state of Nebraska; that this affidavit is made for the purpose of obtaining service upon them by publication,—this cause being one of those mentioned in Section 77 of the Code of Civil Procedure of the General Statutes of Nebraska, to wit. being for the sale of real property under a mortgage; and further affiant saith not.” In the opinion the court say; “It will be seen that the affidavit in question conforms to the requirements of Section 78. It states the nature of the cause of action, not in apt words, perhaps, but sufficiently so that the case appears to be one in which service by publication was authorized, and that service of summons could not be made in this state on the defendant or defendants to be served by publication. The rule in *Atkins v. Atkins* that, ‘if there is a total want of evidence upon a vital point in an affidavit, the court acquires no jurisdiction by publication of the summons, but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable,’ is the true rule.”

§ 248. **Service of summons on infant defendants.**—In the case of *Wood v. Kroll*,<sup>2</sup> where irregularities occurred in the substituted service of a summons upon an infant in an action to foreclose, upon a full consideration of the facts

<sup>1</sup> 9 Neb. 200 (1879); s. c. 2. N. W. Rep. 466.

<sup>2</sup> 43 Hun (N. Y.) 323 (1887).

the New York supreme court held that the plaintiff had a right to have the judgment and sale set aside in order to enable him to give service to the infant, and that the purchaser need not be made a party to the action.

§ 253. **Commencement of foreclosure prevents action at law on bond.**—The general rule is that the commencement of an action to foreclose a mortgage prevents an action at law on the bond or note secured thereby, except in extraordinary cases, and by express permission of the court;<sup>1</sup> consequently the effect of the commencement of a foreclosure will be to stay all proceedings in a suit at law on the bond or note;<sup>2</sup> but on an action at law on the note or bond is no bar to an action in equity to foreclose the mort-

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<sup>1</sup> See: *Marx v. Davis*, 56 Miss. 745 (1879); *Meehan v. First National Bank, Neb.* (1895); s. c. 62 N. W. Rep. 490; *Equitable Life Insurance Societies v. Stevens*, 63 N. Y. 341, 345 (1875); *Collins' Petition*, 6 Abb. (N. Y.) N. C. 227, 232 (1879); *Nichols v. Smith*, 42 Barb. (N. Y.) 381 (1864); *Ogden v. Bodle*, 2 Duer. (N. Y.) 611 (1853); *Engle v. Underhill*, 3 Edw. Ch. (N. Y.) 249 (1838); *Moore v. Anglo-American Dry Dock Co.*, 81 Hun (N. Y.) 389 (1894); s. c. 31 N. Y. Supp. 110, 63 N. Y. S. R. 380; *Suydam v. Bartle*, 9 Paige Ch. (N. Y.) 294 (1841); *Williamson v. Champlin*, 8 Paige, Ch. (N. Y.) 70 (1839); s. c. 1 Clarke, Ch. (N. Y.) 9; *Anderson v. Pilgrim*, 30 S. C. 499 (1889); s. c. 9 S. E. Rep. 587; 4 L. A. R. 205; also *Ante*, § 10a.

**Leave of the court having jurisdiction of a foreclosure action in which a decree has been rendered is essential to the commencement of an action at law to enforce the obligation of an indorser upon a note secured by the mortgage, under the Nebraska Code of Civil Procedure, §§ 847, 849, authorizing a deficiency judgment in**

the foreclosure action against such an indorser, and § 848, providing that no proceeding shall be had at law for the recovery of a debt secured by a mortgage after a decree in foreclosure, unless authorized by the Court. *Meehan v. First National Bank*, 44 Neb. 213, (1895); s. c. 62 N. W. Rep. 490.

**Leave should not be granted to a bondholder to sue during the pendency of an action to foreclose the mortgage securing such and other bonds, under New York Code of Civil Procedure, § 1628, prohibiting the bringing of any other action without leave of the court to recover any part of the mortgage debt, during the pendency of an action to foreclose the mortgage.** *Moore v. Anglo-American Dry Dock & W. Co.*, 81 Hun (N. Y.), 389 (1894); s. c. 63 N. Y. S. R. 380; 31 N. Y. Supp. 110.

<sup>2</sup> *Cushman v. Leland*, 93 N. Y. 652 (1883); *Schaaf v. O'Brien*, 8 Daly (N. Y.) 181, 183 (1879); *Gillette v. Smith*, 18 Hun (N. Y.), 10, 12 (1879); *Suydam v. Bartle*, 9 Paige Ch. (N. Y.) 294 (1841).

gage.<sup>1</sup> Yet it has been held that the pendency of proceedings against garnishees upon a judgment for a debt secured by mortgage stays foreclosure of the mortgage, under the Nebraska Code, providing that no foreclosure can be had, where proceedings at law for the same debt have been instituted, until their final determination.<sup>2</sup>

§ 255. *Tender after suit brought.*—The rule as to the effect of a tender after suit brought differs in the various states. Thus in New York it is said that an action to foreclose a mortgage being purely *in rem*, the defendant may not plead a tender after suit brought; but in Pennsylvania, a tender, subsequent to the filing of a *scire facias sur mortgage*, of the principal, interest, costs, and half the attorney's fee provided for by the mortgage in case of foreclosure, is sufficient to prevent foreclosure, where the interest was fully paid to within two days of the issuance of the *scire facias* and the mortgage then assigned to plaintiff, who issued the *scire facias* without demand for the principal, although it was several years overdue.<sup>3</sup>

§ 256. *What claims may be foreclosed.*—The general rule is that all valid mortgages may be foreclosed where the whole or any portion of the debt secured is due, or default has been made in the payment of either principal or interest, or any other condition broken, regardless of provisions in the instrument giving other remedies, surrounding circumstances, the death of the mortgagor, the loss of the notes and the like.<sup>4</sup> There are cases in which a mortgage may

<sup>1</sup> *Gillette v. Smith*, 18 Hun (N. Y.) 10, 12 (1879); *Comstock v. Drohan*, 8 Hun (N. Y.) 373, 375 (1876).

<sup>2</sup> *Hargreaves v. Menken*, 45 Neb. 668 (1895); s. c. 63 N. W. Rep. 951. See: *Post*, § 285.

<sup>3</sup> *Teller v. Willett* (Pa. C. P.), 31 W. N. C. 127 (1892).

<sup>4</sup> See: *Porter v. Wheeler* (Ala. 1895), 17 So. Rep. 221; *Smith v. Gillam*, 80 Ala. 296 (1885); *Fearn v. Ward*, 80 Ala. 555 (1887); s. c. 2 So.

Rep. 114; *Ringo v. Wing*, 49 Ark. 457 (1887); s. c. 5 S. W. Rep. 787; *Hodges v. Taylor* (Ark. 1890), 13 S. W. Rep. 129; *Nix v. Draughon*, 54 Ark. 340 (1891); s. c. 15 S. W. Rep. 893; *Field v. Anderson*, 55 Ark. 546 (1892); s. c. 18 S. W. Rep. 1038; *Merced Security Savings Bank v. Casaccia*, 103 Cal. 641 (1894); s. c. 37 Pac. Rep. 648; *Dreyfuss v. Giles*, 79 Cal. 409 (1889); s. c. 21 Pac. Rep. 840; *Gutzeit v. Pennie*, 97



be foreclosed before it is due or there is a default in its conditions. Thus it has been held that an agreement in writing, although not embodied in the mortgage itself, designed to make the right of the mortgagee to foreclose the mortgage dependent upon an event other than the expiration of the time limited in the mortgage, at the election of the mortgagee, and thus make it possible to enforce the collection of the money whenever it became evident that the security was becoming insufficient, is legal and valid between the parties, as well as against all persons dealing with the prop-

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- Cal. 484 (1893); s. c. 33 Pac. Rep. 199; *Montgomery v. Robinson*, 76 Cal. 229 (1888); s. c. 18 Pac. Rep. 261; *Bull v. Coe*, 77 Cal. 54 (1888); s. c. 18 Pac. Rep. 808; *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393 (1891); s. c. 27 Pac. Rep. 302; *More v. Calkins*, 95 Cal. 435 (1892); s. c. 30 Pac. Rep. 583; 29 Am. St. Rep. 128; *London, P. & A. Bank v. Smith*, 101 Cal. 415 (1894); s. c. 35 Pac. Rep. 1027; *Lowry v. Parker*, 83 Ga. 341 (1889); s. c. 9 S. E. Rep. 677; *Weihl v. Atlanta Furniture Mfg. Co.*, 89 Ga. 297 (1892); s. c. 15 S. E. Rep. 282; 37 Am. & Eng. Corp. Cas. 693; *Mulcahey v. Strauss*, 154 Ill. 70 (1894); s. c. 37 N. E. Rep. 702, aff'g 52 Ill. App. 252; *Kohii v. Hall*, 141 Ind. 411 (1895); 40 N. E. Rep. 1060; *Milburn v. Milburn* (Ind. 1895), 40 N. E. Rep. 1082; *Colby v. McOmber*, 71 Iowa 469 (1887); s. c. 32 N. W. Rep. 459; *Osborn v. Williams*, 82 Iowa 456 (1891); s. c. 48 N. W. Rep. 811; *Blake v. McCosh*, 91 Iowa 544 (1894); s. c. 60 N. W. Rep. 127; *Andrews v. Morse*, 51 Kan. 30 (1893); s. c. 32 Pac. Rep. 640; *Commonwealth v. Louisville Trust Co.* (Ky. 1894), 26 S. W. Rep. 583; s. c. 16 Ky. L. Rep. 131; *Shelden v. Warner*, 59 Mich. 444 (1886); s. c. 26 N. W. Rep. 667; *Damon v. Deenes*, 62 Mich. 461 (1886); s. c. 29 N. W. Rep. 42; *Newaygo County Mfg. Co. v. Stevens*, 79 Mich. 398 (1890); s. c. 44 N. W. Rep. 852; *Watson v. Grand Rapids & I. R. Co.*, 91 Mich. 198; s. c. 51 N. W. Rep. 990; *Rogers v. Benton*, 39 Minn. 39; s. c. 38 N. W. Rep. 765; 12 Am. St. Rep. 613; *Houston v. Nord*, 39 Minn. 490; s. c. 40 N. W. Rep. 568; *Allendorph v. Ogden*, 28 Neb. 201; s. c. 44 N. W. Rep. 220; *Hargreaves v. Igo*, 64 N. H. 619; s. c. 15 Atl. Rep. 137; 6 N. Eng. Rep. 824; *Bishop Bailey Bldg. & L. Assoc. v. Kennedy* (N. J. Ch. 1888), 12 Atl. Rep. 141; 10 Cent. Rep. 424; *Moore v. Kraemer* (N. J. Eq. & App. 1893); s. c. 26 Atl. Rep. 961; *Point Breeze Ferry & Imp. Co. v. Bragaw*, 47 N. J. Eq. (2 Dick) 298; s. c. 20 Atl. Rep. 967; *Mulford v. Brown*, (N. J. Ch. 1894), 28 Atl. Rep. 513; *Collignon v. Collignon* (N. J. Ch. 1894), 28 Atl. Rep. 794; *Milligan v. Cromwell*, 3 N. M. 327; s. c. 9 Pac. 359; *Wald v. Reynolds*, 3 N. M. 344; s. c. 9 Pac. Rep. 376; *Jarvis v. Chapin*, 59 Hun (N. Y.) 525; s. c. 13 N. Y. Supp. 693; 37 N. Y. S. R. 198; *New York City Baptist Mission Soc. v. Tabernacle Baptist Church*, 15 New York Law Journal (July 8, 1896) 996; *Kirsch v. Tozier*, 63 Hun (N. Y.) 607; s. c. 18



erty with notice of its existence.<sup>1</sup> And it is said that a mortgage of lands which is collateral to the actual personal obligation of the mortgagor enforceable at law, no matter in what shape that obligation exists, may be enforced in foreclosure proceedings,<sup>2</sup> even though an ineffectual attempt to foreclose by advertisement has been made.<sup>3</sup> And it is thought that the pendency of an action by the people for the dissolution of an insolvent corporation is not a bar to a suit to foreclose a mortgage upon the property of the corporation.<sup>4</sup> The fact that the mortgagee has caused the equity of redemption in mortgaged land to be sold in satisfaction of a judgment rendered on a debt not secured by a mortgage, will not impair his right to foreclose.<sup>5</sup> It has been

N. Y. Supp. 334; 44 N. Y. S. R. 654; *Herring v. New York, L. E. & W. R. Co.*, 105 N. Y. 340; s. c. 12 N. E. Rep. 763; 7 Cent. Rep. 308; *Fraser v. Bean*, 96 N. C. 327; *Stewart v. Bardin*, 113 N. C. 277; s. c. 18 S. E. Rep. 320; *Sergeant v. Aberle*, 134 Pa. St. 613; s. c. 20 Atl. Rep. 26; 19 *Id.* 739; 26 W. N. C. 87; 47 Phila. Leg. Int. 366; *Wardlaw v. Rayford*, 27 S. C. 178; s. c. 3 S. E. Rep. 71; *Wylie v. Lipsey*, 31 S. C. 608; s. c. 9 S. E. Rep. 1056; *McDaniel v. Austin*, 32 S. C. 601; s. c. 11 S. E. Rep. 350; *Puckett v. Reed*, 3 Tex. Civ. App. 350; s. c. 22 S. W. Rep. 515; *Hesshaw v. Dyer* (Utah); 24 Pac. Rep. 261; *Hersner v. Martin*, 8 Wash. 698; s. c. 36 Pac. Rep. 1096; *Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317; bk. 38 L. ed. 177; s. c. 17 Sup. Ct. Rep. 348; *Groves v. Sentell*, 153 U. S. 465; bk. 38 L. ed. 785; s. c. 14 Sup. Ct. Rep. 898; *Utermehle v. McGarth*, 1 App. Cas. D. C. 559; s. c. 21 Wash. L. R. 755; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. Rep. 221; 1 L. R. A. 397; 4 Ry. & Corp. L. J. 362; *Farmers' L. & T. Co. v. Win-*

*ona & S. W. R. Co.*, 59 Fed. Rep. 957, *Credit Foncier Franco-Canadien v. Andrew*, 9 Manit. Rep. 65.

The Michigan supreme court hold that where, on a bill filed to enjoin a sale of real estate under a power of sale in a mortgage, and to have the mortgage declared void, the answer claims the benefit of a cross-bill, and the execution of the mortgage and the amount due thereon are admitted, and the validity of the mortgage is established, the foreclosure will be decreed. *Newaygo County Mfg. Co. v. Stevens*, 79 Mich. 398; s. c. 44 N. W. 852.

<sup>1</sup> *Metropolitan L. Ins. Co. v. Hall*, 32 N. Y. S. R. 92; 10 N. Y. Supp. 92.

<sup>2</sup> *Shelden v. Warner*, 59 Mich. 444; s. c. 26 N. W. Rep. 667. This was under How. Mich. Stat. § 6702.

<sup>3</sup> *Rogers v. Benton*, 39 Minn. 39; 12 Am. St. Rep. 613; 38 N. W. 765.

<sup>4</sup> *Herring v. New York, L. E. & W. R. Co.*, 105 N. Y. 340; s. c. 12 N. E. Rep. 763; 7 Cent. Rep. 308.

<sup>5</sup> *Porter v. Wheeler* (Ala. 1895), 17 So. Rep. 221.

said that a failure of the mortgagor to signify a readiness to pay and to unite with the mortgagee in obtaining an order to pay the money into court, where the condition of the mortgage requires it, will allow the mortgagee to foreclose.<sup>1</sup> And a wife who, in consideration of joining with her husband in the execution of a mortgage on behalf of a tract of land owned by him, has received a mortgage on the other half of the tract, providing that it shall be void if the husband shall save to her the inchoate right of dower in the former half of the land, otherwise to remain in full force and virtue, may foreclose her mortgage upon her husband becoming insolvent, and recover the amount thereof, less the consideration paid her for executing a quitclaim deed to the other mortgagee; and she need not wait for the foreclosure of the other mortgage.<sup>2</sup>

§ 256a. Same—Amount due.—A potent clerical error tending to lessen the amount due under the mortgage will not prevent its being foreclosed for the full amount. Thus, it has been said that where a mortgage is conditioned for the payment of \$265, a power of sale “in case of the non-payment of said sum of \$165” is clearly a clerical error, and the mortgagee may foreclose for the amount actually due.<sup>3</sup> And where a mortgage has been assigned as collateral security for a much smaller debt, it may be foreclosed, even as against a junior lienholder, for the full amount and that, too, before the last secured note is due.<sup>4</sup>

§ 256b. Same—Mortgage on charitable institutions.—The supreme judicial court of Kentucky, in the case of *Commonwealth v. Louisville Trust Company*,<sup>5</sup> say that the holder of mortgage bonds of a charitable institution issued under legislative authority for money borrowed by it to erect new buildings, is not bound, where such buildings

<sup>1</sup> *Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317; bk. 38 L. ed. 177; s. c. 14 Sup. Ct. Rep. 348.

<sup>2</sup> *Milburn v. Milburn (Ind.)*, 40 N. E. Rep. 1082.

<sup>3</sup> *Damon v. Deeves*, 62 Mich. 465; s. c. 29 N. W. Rep. 42.

<sup>4</sup> *Colby v. McOmber*, 71 Iowa, 469; s. c. 32 N. W. Rep. 459.

<sup>5</sup> 26 S. W. Rep. 583; s. c. 16 Ky. L. Rep. 131.

were never finished and no rents received therefrom, to look alone for the payment of the bonds to the contemplated rents of the buildings under a provision of the statute creating a sinking fund into which the rents were to be paid and the money arising therefrom applied to the redemption or payment of the bonds.

§ 256c. Same—Mortgage by church corporation.—In the case of *The New York Baptist Mission Society v. The Tabernacle Baptist Church*<sup>1</sup> the counsel for the defendants contended that a foreclosure could not be decreed because by a provision contained in the bond and mortgages<sup>2</sup>

<sup>1</sup> 15 New York Law Journal (July 8, 1896), p. 996.

<sup>2</sup> The following recital is contained in all of said bonds :

“And whereas it is the intention of the said obligee, in order to secure said loan to the Baptist denomination (and for Baptist Church use for all time), to extend the time of payment of the said principal sum (naming it) so long as the property mentioned and described in the accompanying mortgage, bearing even date herewith, shall belong to the said Tabernacle Baptist Church, and the church edifice erected thereon shall be used as a regular Baptist house of worship, and the congregation worshipping in said house of worship shall be recognized by The Southern New York Baptist Association or its successors as a regular Baptist Church, and the other building or buildings erected on said premises shall be used exclusively for religious services and parsonage purposes, and for mission or other charitable work conducted by the said Baptist Church, and so long as the said Baptist Church shall pay to the said obligee (naming him), his executors, administrators or assigns, the nominal interest of one dollar per annum, for the whole of said principal sum,

yearly, as the same shall accrue, on the first day of May in each and every year until the said principal sum shall be fully paid ;” and also conditions to the following effect :

“1. That the principal sum should be payable and payment thereof *enforced only* when the mortgaged premises should cease to belong to The Tabernacle Baptist Church, or the church edifice should cease to be used as a regular Baptist house of worship, or the congregation worshipping therein should cease to be recognized by The Southern New York Baptist Association, or the other buildings erected upon the premises should cease to be used exclusively for religious services and parsonage purposes and for mission and other charitable work conducted by said Baptist Church, or the said Baptist Church shall fail to pay to the obligee, his executors, administrators or assigns the nominal interest as the same shall accrue on the first day of May in each year. But in the event of the property being sold at any time, or the church edifice ceasing to be used as a regular Baptist house of worship, or the congregation worshipping therein ceasing to be recognized by The Southern New York Baptist Association or its successors as a regu-

the payment of the principal sums can be enforced only in the event of the sale of the church property, or said property ceasing to belong to it, or upon the church edifice ceasing to be used as a regular Baptist house of worship, and the congregation worshipping therein ceasing to be recognized by The Southern New York Baptist Association, or upon the buildings other than the church edifice being used for religious services and other charitable work conducted by

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lar Baptist Church, or the other buildings erected on said premises ceasing to be used exclusively for religious services and parsonage purposes and for mission or other charitable work conducted by said Baptist Church; that then, on the happening of either or any of said contingencies, the whole of the principal sum shall become due and payable immediately thereafter.

"2. That if default should be made in the payment of the interest or any part thereof on any day whereon the same is made payable, or should any tax or assessment or water rent be hereafter levied or imposed or become a lien or charge upon the mortgaged premises, and should the interest remain unpaid, &c., for thirty days, or said tax or assessment or water rent remain unpaid and in arrears for ninety days, then and from thenceforth, that is to say, after the lapse or expiration of either one of said periods as the case may be, the principal sum, with all arrearage of interest thereon, should, at the option of the obligee, his legal representatives or assigns become due and payable immediately thereafter, although the contingencies on the happening of which payment of the principal sum above provided for may not then have happened, anything hereinbefore (in said bond) contained to the contrary notwithstanding.

"3. A covenant on the part of the obligor to keep the church edifice and

other buildings erected or to be erected on the mortgaged premises insured in an amount sufficient to rebuild the church edifice and the other buildings in case of their destruction, and in default thereof the obligee or his legal representatives or assigns should have the right to effect such insurance and to add the premiums paid with interest to the principal sum mentioned in said bond and secured by the mortgage, which should be a lien upon the mortgaged premises and be secured by said mortgage, and the whole of such principal, &c., should, at the option of the obligee and his legal representatives or assigns, become due and payable, anything in said bond contained to the contrary notwithstanding.

"4. A covenant to apply the insurance moneys, with all convenient speed and within a reasonable time, to the rebuilding of the church edifice and other buildings in case of their destruction, and in default of so doing, declaring that the principal sum, &c., should, at the option of the obligee, his legal representatives or assigns, become due and payable immediately thereafter, anything in said bond contained to the contrary notwithstanding.

"5. Each mortgage recites the bond which accompanied it and also the conditions and covenants therein contained."

said Baptist Church. None of which events happened; there was no breach of the conditions of the bonds in these respects; but the evidence established the following breaches of the condition of each of the bonds in question: (1.) The omission to pay the interest; (2) The omission to pay certain water rents and assessments; and (3.) The omission to insure the church edifice and the other buildings in an amount sufficient to rebuild them in case of their destruction. The court held that, upon a comprehensive interpretation of all the instruments involved, that the conditions contained in the bonds accompanying the mortgages as to the use of the church and the payment of interest, taxes and assessments, and the insurance of the buildings, were absolute and independent covenants and conditions, and that, upon the breach of any one of them, in the absence of fraud and deceit on the part of the mortgagees or their representatives, they had the option to declare the principal amounts to be due and payable and, consequently, the right to foreclose the mortgages, although the instruments also expressed the general intention that the principal sums should be payable and payment thereof enforced only when the mortgaged premises should cease to belong to the mortgagor—a Baptist Church—"or the church edifice should cease to be used as a regular Baptist house of worship, or the congregation worshipping therein should cease to be recognized by The Southern New York Baptist Association, or the other buildings erected upon the premises should cease to be used exclusively for religious services and parsonage purposes and for mission and other charitable work conducted by said Baptist Church."<sup>1</sup> The court also held that the assignments of the mortgages in question were not open to objections either of insufficiency of legal authority or defect of statutory formality, and that none of the transfers of such mortgages was void on the ground of unconstitutionality.

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<sup>1</sup> The court cite in support of their position the following cases, to wit: *Bennett v. Stephenson*, 53 N. Y. 508; *Leopold v. Hallheimer*, 37 N. Y. Supp. 154; *Malcolm v. Allen*, 49 N. Y. 448;



§ 256d. Same.—Mortgage assigned as collateral security.—It is held that a mortgage assigned as collateral security for a much smaller debt may be foreclosed, as against objection of a junior lien-holder, for its whole amount, and before the last secured debt is due.<sup>1</sup> And the foreclosure of a mortgage assigned as collateral security, not to collect the principal debt, but to preserve the security, does not bar an action upon another mortgage executed as security for the principal debt, under a statute<sup>2</sup> providing that there can be but one action for the recovery of any debt secured by a mortgage upon real property.<sup>3</sup>

§ 256e. Same—Death of mortgagor—Presentation of claim.—The death of the mortgagor before maturity or payment of a mortgage debt does not in any way affect the rights of the mortgagee to foreclose the mortgage on default of any of its covenants,<sup>4</sup> without previous presentation as a claim against the estate,<sup>5</sup> or an allowance by the administrator or

<sup>1</sup> Colby v. McOmber, 71 Iowa 469; 32 N. W. Rep. 459.

<sup>2</sup> Such as Cal. Code Civ. Proc. §726.

<sup>3</sup> Merced Secur. Sav. Bank v. Casaccia, 103 Cal. 641; 37 Pac. Rep. 648.

<sup>4</sup> See: Fearn v. Ward, 80 Ala. 555; s. c. 2 So. Rep. 114; Smith v. Gillman, 80 Ala. 296; Gutzeit v. Pennie, 98 Cal. 327; s. c. 33 Pac. Rep. 199; More v. Calkins, 95 Cal. 435; s. c. 30 Pac. Rep. 583; 29 Am. St. Rep. 128; Anglo Nevada Assur. Corp. v. Nadeau, 90 Cal. 393; 27 Pac. Rep. 302; Dreyfuss v. Giles, 79 Cal. 409; s. c. 21 Pac. Rep. 840; Bull v. Coe, 77 Cal. 54; 18 Pac. Rep. 808; Kohli v. Hale, 141 Ind. 411; s. c. 40 N. E. Rep. 1060; Andrews v. Morse, 51 Kan. 30; s. c. 32 Pac. Rep. 640; Barrick v. Horner, 78 Md. 253; s. c. 27 Atl. Rep. 1111; Fraser v. Bean, 96 N. C. 327; s. c. 2 So. Rep. 159; Puckett v. Reed, 3 Tex. Civ. App. 350; s. c. 22 S. W. Rep. 515.

The right of a trustee in a trust deed, which conveys the legal title, to

execute the power of sale conferred thereby, is not affected upon the death of the grantor by Cal. Code Civ. Proc., §§ 1493, 1502, providing for presentation of claims against estates, or by § 1500, allowing foreclosure of mortgages only when all recourse against any other property of the estate is expressly waived in the complaint, since such death does not revoke the power or limit the effect of the deed. More v. Calkins, 95 Cal. 435; s. c. 29 Am. St. Rep. 128; 30 Pac. Rep. 583.

<sup>5</sup> Fearn v. Ward, 80 Ala. 555; s. c. 2 So. Rep. 114; Smith v. Gillam, 80 Ala. 296; Hodges v. Taylor (Ark. 1890), 13 S. W. Rep. 129; Gutzeit v. Pennie, 98 Cal. 327; s. c. 33 Pac. Rep. 199; Anglo Nevada Assur. Corp. v. Nadeau, 90 Cal. 393; s. c. 27 Pac. Rep. 302; Dreyfuss v. Giles, 79 Cal. 409; s. c. 21 Pac. Rep. 840; Bull v. Coe, 77 Cal. 54; s. c. 18 Pac. Rep. 808; Andrews v. Morse,



a court<sup>1</sup> because the death of the mortgagor in no wise affects the lien of the mortgagee or his rights thereunder, even as against the heirs of the mortgagor, who have a right to have the mortgage debt paid out of the personal property of the decedent;<sup>2</sup> but where the mortgage is foreclosed without presentation and allowance against the estate of the deceased mortgagor, the collection of the debt will be limited to the proceeds arising from the sale of the mortgaged property.<sup>3</sup> And an action to foreclose a mortgage may be prosecuted to judgment against the grantees of the mortgagor and subsequent incumbrancers, although an administrator of the deceased mortgagor is removed pending the suit and no other is appointed in his stead, where the plaintiff waives all recourse against any of the property of

51 Kan. 35 ; s. c. 32 Pac. Rep. 640 ;  
Fraser v. Bean, 96 N. C. 327 ; s. c.  
2 So. Rep. 159. See: *Post*, § 256g.

In **Alabama** the failure to present the debt as a claim against the estate of the deceased mortgagor, within eighteen months after the granting of letters of administration (Code, §2597), is no bar or defense to a bill for the foreclosure of the mortgage. *Fearn v. Ward*, 80 Ala. 555; *Smith v. Gillam*, 80 Ala. 296.

In **California** the mortgagee of property of a deceased person need not present the mortgage as a claim against the estate ; and his failure to do so is no bar to his right to foreclose, under the Code of Civil Procedure, § 1500, where the complaint in the foreclosure suit expressly waives all claims against any other property of the estate. *Dreyfuss v. Giles*, 79 Cal. 409 (1889); s. c. 21 Pac. Rep. 840. And this right is not affected because such right is already barred for failure to present the debt as a claim against the estate within the time given by Cal. Code of Civ. Proc. §§ 1493 1500. *Anglo Nevada Assur.*

*Corp. v. Nadeau*, 90 Cal. 393; s. c. 27 Pac. Rep. 302.

**Same**—A mortgage executed by one party to secure the debt of another is enforceable against the property after the debtor's death, although the holder of the note does not present it as a claim against his estate. *Bull v. Coe*, 77 Cal. 54; s. c. 18 Pac. Rep. 808.

In **Kansas** the failure of the mortgagee to exhibit his mortgage debt as a demand against the estate of a deceased mortgagor within the statutory time for presentation of claims will not preclude the foreclosure of the mortgage and the subjection of the mortgaged property to the payment of the debt ; but unless the claim is so exhibited, the collection of the debt is limited to the proceeds arising from the sale of the mortgaged property. *Andrews v. Morse*, 51 Kan. 30 ; 32 Pac. Rep. 640.

<sup>1</sup> *Kohli v. Hale*, 141 Ind. 411; s. c. 40 N. E. Rep. 1060.

<sup>2</sup> *Fraser v. Bean*, 96 N. C. 327.

<sup>3</sup> *Andrews v. Morse*, 51 Kan. 30 ; s. c. 32 Pac. Rep. 640.

the estate except the mortgaged premises.<sup>1</sup> On parity of principle it has been held that administration upon a mortgagee's estates is not necessary for the foreclosure of a mortgage upon land which he had sold prior to his death, if no personal judgment is sought.<sup>2</sup>

§ 256f. **Same—Defective and mutilated mortgages.**—It has been held that a mortgage which by its terms is expressly intended to secure payment of a note, but is defective, in the power of sale, in providing only for payment of costs of the trust and interest, without making any provision for the principal, may be foreclosed by a court of equity without waiting for the instrument to be reformed.<sup>3</sup> And the New Jersey court of chancery has said the fact that a bond and mortgage are mutilated by having a portion of the first page torn off, and by the destruction of the seals and signatures, will not prevent foreclosure upon proof that the mutilation was the mistake of the mortgagee who intended to and supposed he was destroying some other paper, especially in connection with a written admission by the mortgagor under seal, of the fact of such mistake, coupled with a promise to pay the amount secured by the mortgage.<sup>4</sup>

§ 256g. **Same—Mortgage on homestead.**—In some states a mortgage lien is postponed to the homestead exemption rights, and although a lien on the property, it cannot be enforced until after the homestead right expires.<sup>5</sup> In those states where a mortgage on the homestead may be

<sup>1</sup> Gutzeit v. Pennie, 98 Cal. 327; 33 Pac. Rep. 199.

<sup>2</sup> Puckett v. Reed (Tex. Civ. App.), 22 S. W. Rep. 515.

<sup>3</sup> Milligan v. Cromwell, 3 N. M. 327; s. c. 9 Pac. Rep. 359; Seewald v. Reynolds, 3 N. M. 344; s. c. 9 Pac. Rep. 376.

<sup>4</sup> Collignon v. Collignon (N. J. Ch. 1894), 28 Atl. Rep. 794.

<sup>5</sup> Lowry v. Parker, 83 Ga. 341; s. c. 9 S. E. Rep. 677.

**Purging a mortgage of all the usury in the debt** in the judgment of foreclosure, does not prevent the waiver of homestead and exemption from being void and remaining void. The mortgage lien will be postponed to an exemption right afterwards asserted in the property, but the lien can be enforced after such right expires. Lowry v. Parker, 83 Ga. 341; s. c. 9 S. E. Rep. 677.

enforced by foreclosure, the mortgagee of a homestead is not required to exhaust other securities before foreclosing the mortgage on such homestead.<sup>1</sup> In those cases where the husband and wife join in mortgaging their homestead, and the husband is subsequently adjudged insolvent, the holder of the mortgage may foreclose without presenting a claim against the insolvent's estate.<sup>2</sup>

§ 256h. **Same—Indemnity mortgages.**—A mortgage to indemnify may be foreclosed like any other mortgage.<sup>3</sup> Thus it has been said that a mortgage upon other lands of a grantor to secure the repayment of the whole purchase money of land the title to which is in litigation, in case of failure of title by an adverse determination, may be foreclosed before eviction and without first bringing an action on the covenants of seisin in the deed to determine the damages, since the latter are liquidated by the mortgage itself.<sup>4</sup> And where a mortgage is given to indemnify the mortgagor's sureties in a note to a third person, and also to secure another note given by the mortgagor to one of his sureties, and the co-sureties afterwards release all their interest in the mortgage to the surety holding the note for his own benefit, the latter may, in enforcing the mortgage for the satisfaction of his own debt, include a foreclosure for the benefit of himself and his co-sureties, although the payee and holder of such note is not made a party.<sup>5</sup>

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<sup>1</sup> *Blake v. McCosh*, 91 Iowa 544; s. c. 60 N. W. Rep. 127.

<sup>2</sup> *Montgomery v. Robinson*, 76 Cal. 229; 18 Pac. Rep. 261. See: *Ante*, § 256e.

**Under California Code of Civil Procedure**, § 1475, requiring presentation of claims secured by liens on the homestead against a decedent's estate, a deed absolute intended as a mortgage, made by husband and wife upon her separate property, which had been declared a homestead, to secure his debt, can be foreclosed after his death, although no claim is presented

against the estate, upon which the creditor has waived all demands for the mortgage debt. *Bull v. Coe*, 77 Cal. 54; s. c. 18 Pac. Rep. 808.

<sup>3</sup> *Houston v. Nord*, 39 Minn. 490; s. c. 40 N.W. Rep. 568; *Nix v. Draughan*, 56 Ark. 240; s. c. 15 S. W. Rep. 893; *McDaniel v. Austin*, 32 S. C. 601; s. c. 11 S. E. Rep. 350. See: *Ante*, § 50.

<sup>4</sup> *Nix v. Draughan*, 56 Ark. 240; s. c. 15 S. W. Rep. 893.

<sup>5</sup> *McDaniel v. Austin*, 32 S. C. 601; s. c. 11 S. E. Rep. 350.

§ 256i. **Same—Lost mortgages or notes.**—The chancery court of New Jersey has held that a mortgage executed to a person since deceased may be foreclosed as a lost mortgage where, although there is some conflict in the evidence as to whether it has been paid, the weight of the evidence is against that theory, and it is claimed that the deceased lost or mislaid it during one of his fits of temporary mental aberration.<sup>1</sup> And a foreclosure and sale under a mortgage given to secure notes is proper upon proof that they are due and unpaid, and are lost, and have never been sold or disposed of.<sup>2</sup> But a complaint to foreclose a mortgage securing a note is properly dismissed where an allegation that the note is lost is denied by answer, and is not proved upon the trial, and the note is not produced.<sup>3</sup>

§ 256j. **Same—Other securities.**—A mortgagee holding other securities for the same debt will not be required to exhaust such other securities before proceeding to foreclose his mortgage;<sup>4</sup> he is entitled to waive such other securities, if he so elects.<sup>5</sup> Neither can a mortgagee be com-

<sup>1</sup> *Mulford v. Brown* (N. J. Ch. 1894), 28 Atl. Rep. 513.

<sup>2</sup> *Allendorph v. Ogden*, 28 Neb. 201; s. c. 44 N. W. Rep. 220.

<sup>3</sup> *Field v. Anderson*, 55 Ark. 546; s. c. 18 S. W. Rep. 1038.

<sup>4</sup> *Bull v. Coe*, 77 Cal. 54; s. c. 18 Pac. Rep. 808, *Blake v. McCosh*, 91 Iowa 544; s. c. 60 N. W. Rep. 127; *Weihl v. Atlanta Furniture Mfg. Co.*, 89 Ga. 297; s. c. 15 S. E. Rep. 282; 37 Am. & Eng. Corp. Cas. 693; *Moore v. Kraemer* (N. J. Ch. 1893), 26 Atl. Rep. 961; *Bishop Bailey Building & Loan Association v. Kennedy* (N. J. Ch. 1883), 12 Atl. Rep. 141; 10 Cent. Rep. 424; *Hersner v. Martin*, 8 Wahs. 698; s. c. 36 Pac. Rep. 1096.

Even when the mortgage on a homestead *Blake v. McCosh*, 91 Iowa 544; s. c. 60 N. W. Rep. 127; *Stiles v. Stannard* (Vt. 1895), 31 Atl. Rep. 294.

**The Alabama rule**, set out in § 263 of the last edition of this work is not approved of by the late decisions in other states, and is thought to be unsound in principal. See discussion in this Supplement, § 263.

<sup>5</sup> *Bull v. Coe*, 77 Cal. 54; s. c. 18 Pac. Rep. 808; *Hersner v. Martin*, 8 Wash. 698; s. c. 36 Pac. Rep. 1096.

Thus it has been said that a holder of a mortgage for the purchase price of land to whom is also assigned as additional security the interest of the mortgagor in certain notes, which have never come into his hands but remain in the hands of the one from whom the mortgagor purchased them, as security for their purchase price, may waive such additional security and foreclose the mortgage without accounting for the notes assigned to him. *Hersner v. Martin*, 8 Wash. 698; s. c. 36 Pac. Rep. 1096.

pelled to proceed against one who has agreed to indemnify him against loss in case the mortgage security is insufficient to pay the note to secure which it is given, and who has agreed with the mortgagor that he would pay the note when due, before resorting to the mortgage security.<sup>1</sup> For this reason it is thought that the creditors of an insolvent corporation cannot compel the holder of a mortgage taken in good faith as further security for the note of the corporation indorsed by stockholders or directors, to proceed first against the indorsers; but their only method of preventing his selling under the mortgage is to advance the mortgage debt and demand an assignment of the note and mortgage.<sup>2</sup> But it has been held that where a building association holds a first mortgage upon real estate, and, as an additional security, stock issued by it to the mortgagor, it will be compelled, for the benefit of a second mortgagee, to first exhaust such additional security.<sup>3</sup>

In a recent case the New Jersey court of errors and appeals held that a widow entitled to a legacy under her husband's will, who takes from one of the executors having funds in hand for the payment of the legacy a mortgage on lands held by him in trust, and executes a release of the legacy to the executors, which is filed as a voucher for payment, is a purchaser for value of the mortgage, and cannot be compelled to resort first to the executors or the estate from which such legacy is payable, before enforcing her mortgage as against the owners of the lands.<sup>4</sup>

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**Under California Code of Civil Procedure, § 726,** providing that there can be but one action for the recovery of a debt secured by a mortgage, a mortgagee who also has the title to property purchased jointly with the debtor, but conveyed to the mortgagee separately as further security for the same debt, may foreclose the mortgage, waiving, if he chooses, the security of the other property. *Bull v. Coe*, 77 Cal. 54; s. c. 13 Pac. Rep. 808.

<sup>1</sup> *Stiles v. Stannard* (Vt. 1895), 31 Atl. Rep. 294.

<sup>2</sup> *Weihl v. Atlanta Furniture Mfg. Co.*, 89 Ga. 297; s. c. 15 S. E. Rep. 282; 37 Am. & Eng. Corp. Cas. 693.

<sup>3</sup> *Bishop Bailey Building & Loan Association v. Kennedy* (N. J. Ch. 1888), 12 Atl. Rep. 141; 10 Cent. Rep. 424.

<sup>4</sup> *Moore v. Kraemer* (N. J. Err. & App.), 26 Atl. Rep. 961.



§ 256k. Same — Mortgage on partnership property.—A mortgage on individual property which is put into a partnership by the mortgagor before the filing of the mortgage for record can only be enforced against the interest in the property left to the mortgagor after settlement of the partnership business.<sup>1</sup> But it has been said that one to whom a partner has given a mortgage on his separate land to secure a partnership debt without personally binding himself for the payment of the debt, may, after the death of such partner, bring an action to foreclose the mortgage without first proceeding against the surviving partner.<sup>2</sup>

§ 256l. Same—Mortgage on undivided interest.—Partition.—The supreme court of South Carolina have said that to an action for the mere foreclosure of a mortgage on an undivided interest in land, the right of the plaintiff to recover judgment is not affected by any question as to the nature and extent of such interest.<sup>3</sup> And it is thought that the voluntary partition of the property converted by an indivisible mortgage does not operate to prevent the mortgage creditor from enforcing his mortgage against either part thereof.<sup>4</sup>

§ 256m. Same—Mortgage with power of sale.—The fact that a mortgage contains a power of sale<sup>5</sup> will not deprive the mortgagee of the right, or take away the jurisdiction of a court of equity, to foreclose the mortgage;<sup>6</sup> and a provision in a mortgage containing no power of sale that after default the mortgagee or his assigns may take possession of the mortgaged premises, and receive the rents until the right of the parties shall be fully adjusted according to

<sup>1</sup> Ringo v. Wing, 49 Ark. 457; s. c. 5 S. W. Rep. 787.

<sup>2</sup> London P. & A Bank v. Smith, 101 Cal. 415; s. c. 35 Pac. Rep. 1027.

<sup>3</sup> Wylie v. Lipsey, 31 S. C. 608, mem; s. c. 9 S. E. Rep. 1056.

<sup>4</sup> Groves v. Sentell, 153 U. S. 465;

bk. 38 L. ed. 785; s. c. 14 Sup. Ct. Rep. 898.

<sup>5</sup> See: *Post*, § 264, *et seq.*

<sup>6</sup> Utermehle v. McGarth 1 App. Cas. D. C. 359; 21 Wash. L. Rep. 755, Credit Foncier Franco-Canadien v. Andrew, 9 Manit. Rep. 65; See: § 264.



law, does not prevent the mortgagee from having the land sold under a deed of foreclosure if the debt is not paid.<sup>1</sup>

§ 256n. Same—Prior sale on superior lien.—It is thought that the sale of mortgaged premises upon prior mortgages, and the application of the proceeds upon them, do not prevent a subsequent action on a junior mortgage.<sup>2</sup> And it has been said that a stipulation and judgment in a suit to foreclose a prior mortgage, that the premises be sold so as to realize sufficient to pay the junior mortgage, does not require the holder of the latter, upon failure of the purchasers of some of the parcels to complete their purchases, to proceed against them; but he is at liberty to foreclose his mortgage against the parcels the purchase of which has not been completed.<sup>3</sup>

The supreme court of Michigan, in the case of *Watson v. The Grand Rapids and Indiana Railroad Company*,<sup>4</sup> say that a second mortgagee of property including a railroad right of way is under no duty to the railroad company, in bidding at a sale under the prior mortgage, at which the property without that portion sold to the railroad company was first put up, to bid upon both parcels when he can protect himself by bidding upon one alone, and, on purchasing the portion so put up for an amount sufficient to satisfy the prior mortgage, may, in the absence of any conduct on his part to mislead the railroad company, foreclose his second mortgage upon the railroad property.

§ 256œ. Same—Release of mortgagor from personal liability.—The lien of the mortgagee on the land is a thing separate and distinct from his right to a personal judgment for any deficiency that may arise on foreclosure and sale of the premises; hence it has been held that a purchaser of mortgaged premises subject to the mortgage cannot object to a foreclosure because the mortgagor has been released

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<sup>1</sup> *Stewart v. Bardin*, 113 N. C. 277; s. c. 18 S. E. Rep. 320.

<sup>2</sup> *Hargreaves v. Igo*, 64 N. H. 619; s. c. 15 Atl. Rep. 137; 6 N. Eng. Rep. 824.

<sup>3</sup> *Jarvis v. Chapin*, 59 Hun 525; 37 N. Y. S. R. 198; 13 N. Y. Supp. 693.

<sup>4</sup> 91 Mich. 198; s. c. 51 N. W. Rep. 990.

from personal liability for the mortgage debt.<sup>1</sup> The supreme court of Utah, in the case of *Kershaw v. Dyer*,<sup>2</sup> say that the marshal's receipt given to the mortgagors, reciting that a payment by them of the difference between the amount of the decree and a sum bid on one of the lots mortgaged is "in full of all demands as deficiency," is not binding on the mortgagee, who, on the failure of the bidder to comply with his bid and a second sale of the lot for a less sum, is entitled to have the other lot sold to pay the deficiency, although it has been mortgaged to third persons on the faith of the receipt.

§ 256p. **Same—Riparian mortgages.**—It is thought that on the foreclosure of a mortgage given by a riparian owner, covering the shore, and including land lying under water in front of the upland, which was afterwards leased from the state and improved by filling below high-water mark, the rights of the mortgagee in the land which was submerged at the time the mortgage was given, and which has since been reclaimed, should be defined before the sale is ordered;<sup>3</sup> otherwise an uncertain interest will be sold, which would be an injustice to all the parties. The purchaser at such a sale would buy an equitable estate and interest which could only be settled by a suit in equity. It would be contrary to equitable principles to thus invite further litigation, and make it necessary to bring the parties again before the court in other proceedings to determine rights which can be ascertained and defined before the sale is ordered, and for these reasons they should be first defined so as to do justice to all when the lands are sold for the payment of the mortgage debt.<sup>4</sup> In the course of the opinion in *Point Breeze Ferry and Improvement Company v. Bragaw*,<sup>5</sup> Judge Scudder, speaking for the court, says: "At the time the mortgage was given, the mortgagor was a

<sup>1</sup> *Osborn v. Williams* (Iowa), 48 N. W. Rep. 811.

<sup>2</sup> 6 Utah 239; s. c. 24 Pac. Rep. 621; 21 *Id.* 1000.

<sup>3</sup> *Point Breeze Ferry & Imp. Co. v.*

*Bragaw*, 47 N. J. Eq. (2 Dick.) 298; s. c. 20 Atl. Rep. 967.

<sup>4</sup> *Id.*

<sup>5</sup> 47 N. J. Eq. (2 Dick.) 298; s. c. 20 Atl. Rep. 967.

riparian owner, and as such he had the right of pre-emption and reclamation to the lands under water in front of his land bordering thereon. These could not be taken from him by the state, through its agent, the board of riparian commissioners, until after six months' notice in writing he should have neglected to apply for the grant or license, and neglected to pay, or secure to be paid, the price the said commissioners fixed.<sup>1</sup> He could apply to the commissioners for a lease, grant or conveyance, upon such a compensation therefor, to be paid to the state, as should be determined by the commissioners.<sup>2</sup> These rights he conveyed to the mortgagee as security for his mortgage debt, who thereby became entitled to an equitable estate or interest therein.<sup>3</sup> The defendant took the two-foot strip above high-water mark, or the *ripa*, subject to the mortgage, and the right of pre-emption and reclamation of the land under water, as also subject to the equitable interest of the mortgagee."<sup>4</sup>

§ 256q. Same—Six months' clause.—It is not unusual to insert in mortgages given by railways and other corporations, a clause providing that the mortgagor shall retain possession of the mortgaged premises and receive the rents and profits for a period of six months after default and demand; but such claims do not cut off the right of the holders of bonds upon which an installment or interest is unpaid to proceed to foreclose by action. Thus a provision of a mortgage, that until default made in principal or interest for six months after demand of payment the mortgagor shall be suffered and permitted to possess and enjoy the property and use the income, but if default is made for six months it shall be lawful for the trustee to take possession, and that such provision is cumulative to the ordinary remedy by foreclosure, and the trustee may institute proceed-

<sup>1</sup> N. J. Revision, p. 984, § 8 (Laws 1869).

<sup>2</sup> N. J. Revision, p. 985, § 1 (Laws 1871).

<sup>3</sup> In New York a different rule prevails, it is thought, and unless

specifically set forth in the mortgage will not be covered. See: *Post*, § 577t.

<sup>4</sup> *Boon v. Kent*, 42 N. J. Eq. (15 Stew.) 131; s. c. 7 Atl. Rep. 344.

ings to foreclose in such manner as the majority of bondholders may direct,—does not operate as a limitation on the right of holders of overdue interest coupons to enforce payment by bill in equity to foreclose, until the coupons are six months overdue and payment has been demanded in writing, but is merely a limitation upon the power of the trustee to oust the company from possession under the powers granted him.<sup>1</sup> And it is thought that where a mortgage provides for entry, which is not to be made until six months after default and demand of payment, and another article provides for sale equally limited, followed by a paragraph saying: "This provision is cumulative to the ordinary remedies by foreclosure in the courts \* \* \* upon default being as aforesaid,"—six months' delay after default is not necessary before suit for foreclosure.<sup>2</sup>

§ 256r. Same—Wrongful discharge.—It is thought the beneficiaries under a mortgage in trust which has been wrongfully discharged by the trustee upon his purchase for himself of the mortgaged premises may maintain a suit to reinstate and foreclose it, without demanding that it be foreclosed by the trustee or calling him to an account.<sup>3</sup>

§ 256s. What claims can not be foreclosed.—It is not every mortgage that can be foreclosed; but only such as are valid and the rights thereunder are perfect. Thus a mortgagee cannot enforce a mortgage which the mortgagor had no right to make,<sup>4</sup> such as those executed by a guardian upon the lands of his ward,<sup>5</sup> or is otherwise invalid<sup>6</sup> or fraudulent.<sup>7</sup> A mortgage cannot be foreclosed where the

<sup>1</sup> Farmers' Loan & T. Co. v. Winona & S.W. R. Co., 59 Fed. Rep. 957.

<sup>2</sup> Mercantile Trust Co. v. Missouri, K. & T. R. Co., 36 Fed. Rep. 221; s. c. 1 L. R. A. 397; 4 Ry. & Corp. L. J. 362.

<sup>3</sup> Kirsch v. Tozier, 63 Hun (N. Y.) 607; s. c. 44 N. Y. S. R. 654; 18 N. Y. Supp. 334.

<sup>4</sup> Briggs v. Norris, 67 Mich. 325; s. c. 34 N.W. Rep. 582; 11 West. Rep.

475.

<sup>5</sup> Kingman v. Harmon, 32 Ill. App. 529.

<sup>6</sup> Fulton v. Northern Illinois College, 56 Ill. App. 372; Dudley v. Congregation of T. O. of St. F., 19 N. Y. Supp. 605; s. c. 47 N. Y. S. R. 60; Gleaton v. Gibson, 29 S. C. 514; s. c. 7 S. E. Rep. 333.

<sup>7</sup> House v. Lockwood, 17 N. Y. Supp. 817; s. c. 43 N. Y. S. R. 750.

condition on part of the mortgagee remains unperformed;<sup>1</sup> or the notes which the mortgage was given to secure are not in the possession of the holder of the mortgage and no indemnifying bond has been given;<sup>2</sup> or the mortgagee has assigned the mortgage;<sup>3</sup> or the mortgage contains a prohibited penalty;<sup>4</sup> or the right is barred by sale under a prior mortgage, thereby cutting off the mortgagee's equity of redemption;<sup>5</sup> or the right is barred by the lapse of time under peculiar circumstances;<sup>6</sup> or its enforcement for any reason would be inequitable.<sup>7</sup> And equity will not decree

<sup>1</sup> Where a wife signed a mortgage upon their homestead with her husband, on consideration of an agreement that the mortgage would convey an interest in a mill to her husband, the mortgage cannot be foreclosed as against her unless the conveyance is made or offered as provided in the agreement. *Gammon v. Wright*, 31 Ill. App. 353.

<sup>2</sup> *Pharis v. Surrency*, 54 Mo. App. 9.

<sup>3</sup> A receiver of a bank cannot maintain an action to foreclose a mortgage given as collateral security for a note to the bank, where in consideration of a part payment on such note he has assigned the mortgage to a third party, with the agreement that the proceedings thereon shall be conducted in the receiver's name, and the assignee retains possession of the mortgage pursuant to that agreement. *Johnson v. Clarke* (N. J. Ch 1894), 23 Atl. Rep. 353.

<sup>4</sup> The supreme court of state of Washington, in *Krutz v. Robins*, 12 Wash. 7; s. c. 40 Pac. Rep. 415; 23 L. R. A. 676, say that a stipulation in a mortgage providing for interest on the principal note secured thereby, at the rate of 12 per cent. per annum in case of default in payment of the principal, interest, insurance, or taxes, while the note itself

provides for 7 per cent. only until its maturity,—is essentially a penalty, and will not be enforced in equity.

<sup>5</sup> *Land Mortg. Invest. & A. Co. v. Vinson* (Ala. 1895), 17 So. Rep. 23.

<sup>6</sup> Thus it has been said that a mortgage omitting by mutual mistake a part of the property previously agreed to be included cannot be foreclosed against such omitted part, where the right to reform has been lost by lapse of time. *Sprague v. Cochran*, 70 Hun (N. Y.) 512; s. c. 53 N. Y. S. R. 617; 24 N. Y. Supp. 369.

<sup>7</sup> *Sherrer v. Harris* (Ark. 1890), 13 S. W. Rep. 730; *Gordon v. McGinnis*, 92 Mich. 97; s. c. 52 N. W. Rep. 455. *Long v. Long* (Mo. 1894), 23 S. W. Rep. 69; *Pharis v. Surrency*, 54 Mo. App. 9.

This doctrine is forcibly illustrated by a recent decision of the supreme court of Michigan, in which it is held that the business of a corporation is not unprofitable, within the meaning of a trust deed given to secure bonds, providing that if the business is not profitable the trustee may upon request of the bondholders take possession of the property, where, after making proper allowances for differences in inventory prices and for extraordinary expenses in refunding its indebtedness, profit is shown, although its



foreclosure of a mortgage void in law for want of a proper mortgagee, even though the plaintiff has been imposed upon by fraudulent acts of a broker, and all the acts of the plaintiff were in good faith.<sup>1</sup>

The supreme court of Montana, in the case of *Child v. Morgan*,<sup>2</sup> say that a mortgage covering three lots, given to secure a gross sum and containing a condition of defeasance that the said sum is to be a specific lien on one-third thereof on each of the lots, releasable at any time by the payment of such third, is a separate mortgage for such third upon each lot separately, and cannot be foreclosed as an entirety upon all the lots; and a sale of all of them together for a gross sum is invalid.

Where property mortgaged is in the hands of a receiver appointed in a chancery suit brought after the mortgages was executed, to set aside the mortgagor's title, it is contempt of court to file a bill to foreclose the mortgage; yet the court has jurisdiction to foreclose, and will refuse to entertain the suit only upon the application of the receiver, and not in those cases where the receiver's answer merely alleges that he is a receiver of the personality, and disclaims all interest in the realty, and no attempt is made by any of the interested parties to restrain or prevent prosecution of foreclosure.<sup>3</sup>

The supreme court of Kansas say<sup>4</sup> that a real estate mortgage cannot be foreclosed on a railroad right of way condemned after the execution of the mortgage where the company duly paid the award to the proper officer and it was drawn by the mortgagor, although no award was made to the mortgagee. The correctness of this doctrine is very much questioned. There seems to be a hopeless con-

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books, by reason of failure to make such allowances, show a loss. *Michigan Trust Co. v. Lansing Lumber Co.* (Mich. 1894), 61 N. W. Rep. 668.

<sup>1</sup> *Shirley v. Burch*, 16 Oreg. 83; s.c. 8 Am. St. Rep. 273; 18 Pac. Rep. 352.

<sup>2</sup> 51 Minn. 116; s. c. 52 N. W. Rep. 1127. See: *Post*, § 2622.

<sup>3</sup> *Mulcahey v. Strauss*, 154 Ill. 70; 37 N. E. Rep. 702; affg. 52 Ill. App. 252.

<sup>4</sup> *Chicago, K. & W. R. Co. v. Nashua Sav. Bank*, 52 Kan. 467; s. c. 35 Pac. Rep. 18.



flict in decisions on the question whether or not mortgagees are necessary parties to condemnation proceedings.<sup>1</sup> But those cases holding them necessary parties, it is thought, stand on a much higher ground than those holding a contrary view, for the reason that the mortgagee has an interest in the land, and the rights secured to him by his mortgage are property rights which cannot be taken from him without due notice and an opportunity to be heard. To hold that property which is mortgaged for all that it is worth can be condemned and the compensation handed over to an insolvent mortgagor, seems an invasion of equitable principles,<sup>2</sup> and looks very much like depriving a man of his property without compensation and without due process of law; both of which are an invasion of the constitutional rights of a mortgagee. For this reason, it is thought that he is a necessary party, and if not made a party and given an opportunity to protect his interests he may have the same remedy by foreclosure that he would

<sup>1</sup> Some of the authorities holding the affirmative: *South Park Coars. v. Todd*, 172 Ill. 379; *Deisner v. Simpson*, 72 Ind. 435; *Severin v. Cole*, 38 Iowa, 463; *Wilson v. European & North Am. R. Co.*, 67 Me. 358; *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383; *Siman v. Rhodes*, 24 Minn. 25; *Stewart v. Raymond R. Co.* 7 Smed & M. (Miss.) 568; *Platt v. Bright*, 29 N. J. Eq. (2 Stew.) 128; *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. (1 Stew.) 450; *Booraem v. Wood*, 28 N. J. Eq. (1 Stew.) 371; *Warwick Institute for Savings v. Providence*, 12 R. I. 144; *Adams v. St. Johnsbury & Lake Champlain R. Co.*, 57 Vt. 240; *Wade v. Hennessy*, 55 Vt. 207; *Hagar v. Brainard*, 44 Vt. 294; *Wooster v. Sugar River Valley R. Co.*, 57 Wis. 311; s. c. 15 N. W. Rep. 401; *Aspinwall v. Chicago & Northwestern R. Co.* 41 Wis. 474; *Kennedy v. Milwaukee & St. P. R. Co.*, 22 Wis.

581; *Martin v. London, Chatham, etc., R. Co.*, L. R. 1 Eq. Cas. 145.

Some of the cases holding the negative: *Whiting v. New Haven*, 45 Conn. 303; *Cool v. Crommet*, 13 Me. 250; *Welch v. Boston*, 126 Mass. 442; *Bancroft v. Cambridge*, 126 Mass. 438; *Read v. Cambridge*, 126 Mass. 427; *Farnsworth v. Boston*, 126 Mass. 1; *Vaugh v. Wetherell*, 116 Mass. 138; *Paine v. Woods*, 108 Mass. 160; *Breed v. Eastern R. Co.*, 71 Mass. (5 Gray) 470; *Grand Rapids v. Grand Rapids & Ind. R. Co.* 58 Mich. 641. *Bank of Auburn v. Roberts*. 44 N. Y. 192; *Home Ins. Co. v. Smith*, 28 Hun (N. Y.) 296; *Hooker v. Martin*, 10 Hun (N. Y.) 302; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *President, etc., of Schuylkill Navigation Co. v. Theoburn*, 7 Serg. & R. (Pa.) 411; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

<sup>2</sup> *Severin v. Cole*, 38 Iowa 463

have if the property condemned had been conveyed for private uses.<sup>1</sup>

§ 256t. **Same.—Attachment returned—Exhausting legal remedy.**—Under a statute providing<sup>2</sup> that no proceedings shall be had to foreclose after a judgment at law has been obtained, until an execution has been issued on the judgment and returned unsatisfied. The return of an attachment pending an action at law on a debt secured by a mortgage, in which a judgment is obtained, is not sufficient to authorize an action to foreclose the mortgage.<sup>3</sup> The prevailing rule in all the States is that the legal remedy must first be exhausted, in the absence of conditions justifying equitable action. Thus the supreme court of New York, in the case of *Guilford v. Crandell*,<sup>4</sup> say that the holder of a mortgage executed to secure a sum also secured by a judgment by confession, who forecloses it pursuant to an agreement with the mortgagor's wife that the property shall be bid in and the wife shall give a mortgage on the same property to secure the same indebtedness, under the code,<sup>5</sup> providing that where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt an action shall not be commenced or maintained to foreclose the mortgage until an execution has been returned unsatisfied upon the judgment, cannot maintain a suit to foreclose the latter mortgage until the legal remedy upon the judgment by confession is exhausted, since the original indebtedness and judgment are not paid or extinguished.

§ 256u. **Same—Fraud in mortgage prevents foreclosure.**—No principle of law is more firmly established than the doctrine that fraud vitiates all it touches. And the

<sup>1</sup> *Severin v. Cole*, 38 Iowa 463; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb 276; s. c. 29 N. W. Rep. 936; *North Hudson R. Co. v. Booraem*, 23 N. J. Eq. (1 Stew.) 450; *Adams v. St Johnsburys & Lake Champlain R. Co.*, 57 Vt. 240; *Wade v. Hennessy*, 55 Vt. 207; *Kennedy v. Milwaukee & St. P. R. Co.*, 22 Wis. 581.

<sup>2</sup> As does Neb. Code, § 851.

<sup>3</sup> *Hargreaves v. Menken*, 45 Neb. 663; s. c. 63 N. W. Rep. 951.

<sup>4</sup> 69 Hun (N. Y.), 414; s. c. 23 N. Y. Supp. 465; 52 N. Y. S. R. 633.

<sup>5</sup> N. Y. Code Civ. Proc. § 1630.

doctrine applies with pertinent force when an action is brought in equity to enforce mortgages that are tainted with fraud. Thus the supreme court of New York, in the case of *House v. Lockwood*,<sup>1</sup> say that a mortgage intended to enable a husband to go through bankruptcy, and concealed from the court by the mortgagee, who instituted the bankruptcy proceedings and acted therein as an unsecured creditor, will not be enforced in equity.

§ 256v. *Same—Inequitable or oppressive.*—A mortgage will not be foreclosed where to do so would be inequitable or oppressive in the sense of invading a legal equitable right. Thus it has been said that where one person pays a judgment against another, under which land of the latter is about to be sold on execution, and takes a deed of the land, absolute in form, at the same time executing an obligation to reconvey upon the debtor's refunding the amount of the judgment, with interest, during the grantee's life; also executing a conveyance giving the debtor's wife the use of the land for life; and dies after the debtor has made several payments, after which the wife also dies,—his devisee is not entitled to a judgment for the possession, but only to a decree for the balance due on the judgment.<sup>2</sup> A person is also entitled to be relieved from the payment of money given by her uncle for her benefit and her mother to the mortgagee, who induced her to give a mortgage therefor, claiming that he would save it for her and pay it to her after she had secured the whole title to the homestead, and then included such mortgage in the consideration of a mortgage to secure advances made to her.<sup>3</sup> And the purchaser under a second deed of trust is not entitled to maintain an action for the foreclosure of the prior deed of trust, of which he is the equitable assignee for the purpose of recovering a judgment for any deficiency which might result from the sale under it, where the property is worth more than the entire amount due thereon.<sup>4</sup>

<sup>1</sup> 17 N. Y. Supp. 817; s. c. 43 N. Y. S. R. 750.

<sup>2</sup> *Sherrer v. Harris* (Ark. 1890), 13 S. W. Rep. 730.

<sup>3</sup> *Gordon v. McGinnis*, 392 Mich. 97; s. c. 52 N. W. Rep. 455.

<sup>4</sup> *Long v. Long* (Mo. 1894), 28 S. W. Rep. 60.

§ 256w. **Same—Invalid mortgage.**—An invalid mortgage will not be enforced,<sup>1</sup> and a mortgage void on its face, or the invalidity of which appears in the proof required to be produced by the mortgagee to establish it, should be cancelled, at the mortgagor's instance, in a suit to foreclose it, since a title obviously void does not constitute even a cloud.<sup>2</sup> But it is held by the supreme court of South Carolina, in the case of *Gleaton v. Gibson*,<sup>3</sup> that in an action to foreclose a mortgage, if the mortgage proves to be invalid, but the debt intended to be secured thereby is established, judgment can be rendered for the debt.

§ 256x. **Same—Same—Mortgage on ward's lands.**—In all cases a bill to foreclose a mortgage must be dismissed where it appears that the mortgagor, since deceased, took title as guardian for the benefit and to the use of her daughter and ward, whose money furnished the consideration paid for the land; and the fact that the money obtained on the mortgage was expended in improvements will not avail the complainant, especially where no accounting was ever made by the deceased guardian.<sup>4</sup> In the case of *Kingman v. Harmon*,<sup>5</sup> it is said that where the mother and the guardian of a minor executed a mortgage upon the minor's land which is held upon an attempted foreclosure to be void, the mother's interest in the estate of her child, who has since died, cannot be reached by the mortgagee in the foreclosure proceedings.

§ 256y. **Same—Interest paid.**—In the case of *Bolman v. Lohman*,<sup>6</sup> where a mortgage purporting to be given as security for money loaned, made payable on demand, and conditioned that interest be paid semi-annually; and which contained a condition that on failure to pay such interest,

<sup>1</sup> Thus it has been held that a mortgage taken by a city invalid because of its want of power to make the loan, confers no right of action upon the city. *Fulton v. Northern Illinois College*, 56 Ill. App. 372.

<sup>2</sup> *Dudley v. Congregation of T. O.*

of St. F., 47 N. Y. S. R. 60; s. c. 19 N. Y. Supp. 605.

<sup>3</sup> 29 S. C. 514; s. c. 7 S. E. Rep. 833.

<sup>4</sup> *Hunt v. Bradfield* (N. J.), 16 Atl. Rep. 178.

<sup>5</sup> 32 Ill. App. 529.

<sup>6</sup> 79 Ala. 63.

the mortgage might be foreclosed both for principal and interest ; and by which it was further provided that on the death of the mortgagee the money should belong to the mortgagor if living, but in the event of her death, to her surviving children,—the court held this did not authorize foreclosure as to the principal so long as the interest was paid as stipulated, and, when diligent effort to pay promptly was shown, a default and consequent forfeiture could not be claimed. And it has been said by the supreme court of California, in the case of *Van Loo v. Van Aken*,<sup>1</sup> that a mortgage given as security for the payment of a designated sum on a specified date, five years after its execution, with annual interest according to the terms of a promissory note providing for a compounding of the interest if unpaid, cannot be foreclosed before its maturity, for default in payment of the interest.

§ 256z. **Same—Mortgagee administrator.**—It is said in *Brown v. Mann*,<sup>2</sup> that the assignee of a mortgage cannot maintain an action of foreclosure against the estate of a decedent, for which the mortgagee is administrator, if the assignment was made for the sole purpose of having the mortgage foreclosed for the mortgagee's benefit. The federal circuit court sitting in Vermont, in the case of *Sowles v. Witters*,<sup>3</sup> say that mortgages broken, held by an executor who takes another mortgage to himself individually on the same and other lands, for the same amount, with extended time of payment, under an agreement that the original mortgages shall remain in force until the second is paid, and that payment on the latter shall discharge the former and foreclose the second mortgage, and remortgages the property for his individual indebtedness, with notice to the mortgagee of the origin of his title, and who is in effect charged with the mortgages by being ordered to pay legacies to a larger amount, and is exonerated from such charge by the residuary legatee, cannot be foreclosed by him, since the

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<sup>1</sup> 104 Cal. 269; s. c. 37 Pac. Rep. 925.

<sup>2</sup> 71 Cal. 192; s. c. 12 Pac. Rep. 51.

<sup>3</sup> 54 Fed. Rep. 563.



conversion of such mortgages to his own use, and being charged with their amount, makes them his individual property, and his foreclosure of the second mortgage operates to discharge the original mortgages.

§ 257. **Removed fixtures.**—While improvements or fixtures of any kind are attached to the land they are real estate,<sup>1</sup> and pass with it on conveyance, either by deed or mortgage;<sup>2</sup> but when fixtures are once severed they become personal property, and on removal and sale to a *bona fide* purchaser are taken out of the lien of a mortgage. Thus, under the familiar maxim of the common law, *quicquid plantatur solo, solo cedit*, houses and buildings are a part of the real estate upon which they stand, in the absence of any contract or agreement controlling,<sup>3</sup> but when buildings are severed from the mortgaged premises and become part of another freehold, the lien upon them is gone,<sup>4</sup> and the title thereto is vested in the owner of such other freehold or a *bona fide* purchaser.<sup>5</sup> But in those cases where the building is removed from the mortgaged premises without the knowledge or consent of the mortgagee or the assignee for value of the mortgage, to other lots belonging to the mortgagor<sup>6</sup> or his wife,<sup>7</sup> they remain subject to the lien of the mortgage in the hands of a purchaser by quitclaim deed of the lots to which they are removed, and may be sold under the mortgage if the lots covered thereby do not bring sufficient for its satisfaction.<sup>8</sup>

<sup>1</sup> See: 1 Kerr on Real Prop. § 2.

<sup>2</sup> *Id.* §§ 113-122.

<sup>3</sup> *Id.* § 65.

<sup>4</sup> *Harris v. Bannon*, 78 Ky. 568; *Betz v. Vesner*, 46 N. J. Eq. (1 Dick.) 256; s. c. 19 Atl. Rep. 206. See *Buckout v. Swift*, 27 Cal. 433; *Pierce v. Goddard*, 39 Mass. (22 Pick.) 559.

Where a house was floated off the lot by a flood and sold, it was severed from the land and the lien thereon was lost. *Buckout v. Swift*, 27 Cal. 433.

<sup>5</sup> Where materials of a house were used in the construction of

a house on other land, the right of property vested in the grantee of the land. *Pierce v. Goddard*, 39 Mass. (22 Pick.) 559.

<sup>6</sup> *Partridge v. Hemenway*, 89 Mich. 454; s. c. 50 N. W. Rep. 1084.

<sup>7</sup> A dwelling moved by mortgagor to an adjoining lot belonging to his wife, without the knowledge of the mortgagee, but with her knowledge, does not destroy the lien of the mortgagee. *Hamlin v. Parsons*, 12 Minn. 108.

<sup>8</sup> *Partridge v. Hemenway*, 89 Mich. 454; s. c. 50 N. W. Rep. 1084.



It has been said by the Chancery Court of New Jersey where a building has been removed from the land by a mortgagor in possession, on bill to foreclose the mortgage it cannot be returned to the mortgaged property,<sup>1</sup> because property affixed to mortgaged land when once severed, removed and sold to a *bona fide* purchaser, cannot be followed and reclaimed,<sup>2</sup> the remedy of the mortgagee being at law.<sup>3</sup> But the Supreme Court of Louisiana, in the case of *Learned v. Walton*,<sup>4</sup> say that a sequestration of property which is immovable by destination, and forms part of realty under mortgage, but which has been removed therefrom by the mortgagor, as an ancillary proceeding for the recovery and restoration thereof to the mortgaged premises for seizure and sale, is a legal and valid proceeding, and does not have the effect of changing executory proceedings into those *via ordinaria*.

§ 257a. Same—From Leasehold—Following Property.—The Supreme Court of Pennsylvania, in the case of *Gill v. Weston*,<sup>5</sup> say that a mortgagee of leasehold-property has the right to follow property of a chattel nature embraced in the mortgage, wherever he may find it; and the fact that the lessee may have given the party in possession permission to remove it from the leased premises, confers upon the latter no right, where the mortgage has been seasonably recorded, to resist an action by the mortgagee to take it or to refuse to return it on demand, for the reason that the law regards such removal as a fraud upon the mortgagee, and for that reason permits him to follow the

<sup>1</sup> *Betz v. Vesner*, 46 N. J. Eq. (1 Dick.) 256; s. c. 19 Alb. L. J. 206.

<sup>2</sup> *Cooper v. Davis*, 15 Conn. 556; *Clark v. Reyburn*, 1 Kan. 281; *Citizens' Bank v. Knapp*, 22 La. Ann. 117; *Wilson v. Maltby*, 59 N. Y. 126; *VanPelt v. McGraw*, 4 N. Y. 110; *Gardner v. Heartt*, 3 Dun. (N. Y.) 232; *Fryatt v. Sullivan Co* 5 Hill (N. Y.) 116; *Lane v. Hitchcock*, 14 John (N. Y.) 213; *Gore v. Jenness*, 19 Me. 53; *Byrom v. Chapin*, 113 Mass. 308; *Gowding v. Shea*, 103 Mass.

360; *Kircher v. Schalk*, 39 N. J. L. (10 Vr.) 335; *Kimball v. Darling*, 32 Wis. 684; *Hutchins v. King*, 68 U. S. (1 Wall.) 53 bk. 17 L. ed. 544; *Codrington v. Johnstone*, 1 Beav. 520;

<sup>3</sup> *Betz v. Vesner*, 46 N. J. Eq. (1 Dick.) 256; s. c. 19 Atl. Rep. 206.

<sup>4</sup> 42 La. An 455; s. c. 7 So. Rep. 723. See: *Dakota L. & T. Co. v. Parmelee* (S. D.), 58 N. W. Rep. 811.

<sup>5</sup> 110 Pa. St. 312; s. c. 1 Atl. Rep. 921; 1 Cent. Rep. 370.

property and assert his right thereto as against the wrong-doer.<sup>1</sup> And it is thought that there is no reason why such mortgagee may not pursue the property in the hands of the wrong-doer and take it, notwithstanding the mortgage is not yet due, unless the mortgagor has provided against it by reserving to himself the possession and control of the property until a default is made in the payment of the mortgage debt.<sup>2</sup>

§ 257b. Right to cut timber.—The mortgagor has the right to cut timber from the mortgaged premises, for purposes of repairs and necessary domestic use, or even for milling purposes, or general sale, so long as he does not thereby seriously impair the value of the security<sup>3</sup> and it has even been held that a mortgagor of a farm who, while remaining in possession, cuts a reasonable quantity of wood for his own use as fuel, can, on leaving the farm, remove the wood for use elsewhere.<sup>4</sup> But where timber is being cut with the fraudulent purpose of diminishing the value of the security, a court of equity will restrain the act,<sup>5</sup> even in the absence of covenants in the mortgage, because courts of equity have general power, in proper cases, to restrain mortgagors from diminishing the security to the injury of the mortgagee or his assignee.<sup>6</sup>

§ 258. Doctrine of Merger.—The supreme court of

<sup>1</sup> Wittmer's Appeal, 46 Pa. St. 455; Hoskin v. Woodward, 46 Pa. St. 42.

<sup>2</sup> Gill v. Weston, 110 Pa. St. 312; s. c. 1 Atl. Rep. 921; 1 Cent. Rep. 370; Tryon v. Munson, 78 Pa. St. 256, 264; Martin v. Jackson, 28 Pa. St. 504.

<sup>3</sup> Judkins v. Woodman, 81 Me. 351; s. c. 17 Atl. Rep. 298; 3 L. R. A. 607; Ensign v. Colburn, 11 Paige Ch. (N. Y.) 503.

<sup>4</sup> Judkins v. Woodman, 81 Me. 351; s. c. 17 Atl. Rep. 298; 3 L. R. A. 607.

<sup>5</sup> Ensign v. Colburn, 11 Paige Ch. (N. Y.) 503.

<sup>6</sup> See: Robinson v. Russell, 24

Cal. 467; Cooper v. Davis, 15 Conn. 556; Nelson v. Pinegar, 30 Ill. 473; State v. Northern C. R. Co., 18 Md. 198; Parsons v. Hughes, 12 Md. 1; Litka v. Wilcox, 39 Mich. 94; Emmons v. Henderer, 24 N. J. Eq. (9 C. E. Gr.) 39; Phoenix v. Clark, 6 N. J. Eq. (2 Halst.) 447; Robinson v. Preswick, 3 Edw. Ch. (N. Y.) 246; Miles v. French, 11 Hun (N. Y.) 563; Brady v. Waldron, 2 John Ch. (N. Y.) 148; Patton v. Moore, 16 W. Va., 428; Frank v. Brunnemann, 8 W. Va. 462; Bunker v. Locke, 15 Wis. 635.

New York, in the case of *Clements v. Griswold*,<sup>1</sup> say that where, upon the foreclosure of a second mortgage, the mortgagee and a third person bid off the property together, which is conveyed to them by the same deed, one undivided half to the mortgagee and the other to such third person, such purchase and deed will not, as to the undivided half deeded to such third person, and in the absence of an intention of the mortgagee that it should do so, operate to merge or release the lien of a first mortgage on the property held by the mortgagee, nor will a subsequent sale of the undivided half purchased by him have that effect.

§ 262a. Mortgages upon separate pieces of property for the same debt—One instrument is when.—When a mortgage, given to secure a gross sum, covers several separate lots or tracts of land and contains a defeasance that the sum secured is to be a specific lien on each lot for its proportion of the gross sum, and such lot is to be re-salable at any time by the payment of such proportionate amount of the encumbrance, constitutes a separate mortgage for such proportionate amount upon each lot separately, and the mortgage can not be foreclosed upon the lots as one entirety and they sold in a lump for a gross sum, but the foreclosure and sale must be on each separately.<sup>2</sup>

The supreme court of Minnesota, in the case of *Mason v. Goodnow*,<sup>3</sup> have said that a mortgage on several lots, which apportions the sum secured among them, specifying the amount for which each is liable, and providing that each is mortgaged for that sum, and “for no other sum whatever,” and in case of default, “so far as it affects either of said lots,” the whole principal sum represented by such lot shall be due, and the mortgage may be foreclosed for that sum, “it being the intention that this mortgage shall be regarded, and is hereby made, a separate and distinct mortgage for each and every lot, \* \* \* and that a default \* \* \* shall render operative the power of sale only so far as it

<sup>1</sup> 46 Hun (N. Y.) 377; s. c. 11 N. Y. S. R. 826.

<sup>2</sup> *Child v. Morgan*, 51 Minn. 116; s. c. 52 N. W. Rep. 1127.

<sup>3</sup> 42 N. W. Rep. 482.

extends to the lot or lots whereon such default shall have been made,"—in legal effect constitutes a separate mortgage on each lot to secure a separate and distinct sum, although for convenience all were united in one instrument; and while, in case of default on several of the lots, the mortgagee may foreclose as to all lots in default in one notice of sale, yet such notice must state the amount claimed to be due on each lot separately.

§ 263. Where mortgagee has lien on personal property sufficient to pay debt.—In accordance with the doctrine laid down in this section in the last edition of this work, the supreme court of Vermont, in the case of *Blair v. White*,<sup>1</sup> say that where the mortgage security is inadequate, and the executor of the mortgagee prosecuting the suit has in his hands a legacy to the debtor, he should resort to that fund before resorting to the mortgage security to the damage of another creditor entitled to part of the proceeds of the mortgage, but is not bound to do so to the detriment of the estate in respect of other unsecured debts.

The prevailing doctrine at the present time, however, as heretofore set out in this supplement,<sup>2</sup> is that a mortgagee will not be required to resort to other securities, even on the application of subsequent lienors who will suffer loss by his failure to do so. Thus the New Jersey court of chancery, in the case of *Lanahan v. Lawton*,<sup>3</sup> say that a mortgagee suing to foreclose his mortgage will not be required, as against other creditors, to first exhaust his remedy against corporate shares held by him as collateral, but that he will be allowed to endorse them in blank and deposit them with the court.

§ 264. Mortgage with power of sale.—It is not infrequent that mortgages are given with a power to the mortgagee, or to a trustee, on default in the payment of any installment of principal or interest, or the breach of any other covenant, to sell the mortgaged premises. Such pro-

<sup>1</sup> 17 Atl. Rep. 49.

<sup>3</sup> 23 Atl. Rep. 476.

<sup>2</sup> See: *Ante*, § 256j.

visions are valid,<sup>1</sup> and when to the mortgagee, pass under an assignment of the mortgage.<sup>2</sup> A valid sale can be made thereunder either by the mortgagee or his assignee.<sup>3</sup> It has been said that a power of sale in a mortgage, authorizing the mortgagee in case of default to sell the premises at public auction and convey them to the purchaser agreeably to the statute in such case made and provided, is a complete and valid common-law power capable of being executed, even in the absence of any statute regulating the manner of its exercise.<sup>4</sup>

But it is thought that a special power of sale given to a mortgagee or trustee does not take away the jurisdiction of a court of equity on a suit to foreclose.<sup>5</sup> And the death or insanity of the mortgagor does not affect the power of sale where coupled with an interest.<sup>6</sup>

§ 264a. Same—Void under Statute.—In some of the states the statutes provide that all liens on land, other than judgments, shall be foreclosed by suit.<sup>7</sup> In such states a clause in a mortgage, or other instrument creating a lien on land, providing for foreclosure in any manner other than by suit, is void.<sup>8</sup> In other states the sale of property under a power in a mortgage or trust deed is specifically regulated by statute,<sup>9</sup> and in such states a sale under a power without

<sup>1</sup> *Vesey v. Russell*, 65 N. H. 646; s. c. 23 Atl. Rep. 522.

<sup>2</sup> *Johnson v. Glenn*, 80 Md. 369; s. c. 30 Atl. Rep. 993.

<sup>3</sup> *Vesey v. Russell*, 65 N. H. 646; s. c. 23 Atl. Rep. 522.

See: *Thompson v. Ellenz* (Minn.), 59 N. W. Rep. 1023.

<sup>4</sup> *Webb v. Lewis*, 45 Minn. 285; s. c. 47 N. W. Rep. 803.

<sup>5</sup> *Utermehle v. McGreat*, 1 App. Cas. D. C. 359; s. c. 21 Wash. L. Rep. 755; *Credit Foncier Franco-Canadien v. Andrew*, 9 Man. Rep. 65. See: *Ante*, § 156m.

If the right to resort to a suit for foreclosure were taken away by a power for sale contained in a deed of

trust such would not be the case where the mortgage was made by an infant, even if the power were voidable only, and not absolutely void at law, where there has been a formal and complete renunciation of the contract by the infant. *Utermehle v. McGreat*, 1 App. Cas. D. C. 359; s. c. 21 Wash. L. Rep. 755.

<sup>6</sup> *Barrick v. Horner*, 78 Md. 253; s. c. 27 Atl. Rep. 1111.

<sup>7</sup> As in Oregon. See: *Hill's Oreg. Code*, § 414.

<sup>8</sup> *Thompson v. Marshall*, 21 Oreg. 171; s. c. 27 Pac. Rep. 957.

<sup>9</sup> As in Michigan. See: *How. Mich. Stat.*, § 7847.



conforming to the statute will not cut off the equity of redemption.<sup>1</sup> Other states declare by statute, that all contracts for the forfeiture of property subject to a lien, in satisfaction of a lien secured thereby, are void. Within the meaning and prohibition of such a statute is a compromise agreement between a mortgagor and a mortgagee, by which the latter agrees to accept a smaller amount than the sum claimed by it, providing it shall be paid within a designated time, with a sale of the mortgaged property after the expiration of such period, with the consent of the mortgagor, to the mortgagee for the purpose of transferring to the real purchaser, because of a provision in the agreement rendering such sale necessary.<sup>2</sup>

§ 264b. **Same—Who may execute power—Where naked power.**—Powers of sale in mortgages are of two kinds; the one naked powers, and the other powers coupled with an interest. The first can be executed by the person designated only.<sup>3</sup> Thus it is said that a power of sale in a mortgage to a trustee who has no beneficial interest is a collateral and naked power which cannot on his death, pass by operation of law to his legal representatives, although he has become the assignee of the beneficial interest in the mortgage.<sup>4</sup> And the successors of original trustees appointed under a will cannot proceed under a power of sale in a mortgage to the original trustees and their assigns, where the mortgage was not directly transferred, but became their equitable property through an attempt to rid the property of a trust, and they must proceed not under the power in the instrument, but by strict foreclosure.<sup>5</sup>

<sup>1</sup> *Pierce v. Grimley*, 77 Mich. 273; s. c. 43 N. W. Rep. 932.

<sup>2</sup> As California. See: Cal. Civ. Code, § 2889.

<sup>3</sup> *Corcoran v. Hinkel* (Cal. 1893), 34 Pac. Rep. 1031.

<sup>4</sup> *Barrick v. Horner*, 78 Md. 253; s. c. 27 Atl. Rep. 1111; *Bradford v. King*, 18 R. I. 743; s. c. 31 Atl. Rep. 166. Compare: *Western Maryland*

*R. Land & I. Co. v. Goodwin*, 77 Md. 271; s. c. 26 Atl. Rep. 319.

<sup>5</sup> *Barrick v. Horner*, 78 Md. 253; s. c. 27 Atl. Rep. 1111.

<sup>6</sup> *Bradford v. King*, 18 R. I. 743; s. c. 31 Atl. Rep. 166.

A power of sale to the trustee, "his heirs, executors and administrators, and assignees," in a mortgage is not such a naming of the



It is said by the supreme court of Alabama, in the case of *Long v. Stansel*,<sup>1</sup> that a deed of land upon condition that a trust shall be raised for the payment of an amount for which the grantor is liable, and providing for enforcement of the same by its sale as in case of foreclosing mortgages under statute, or by a bill in chancery, and for the execution thereof by some suitable person to be appointed by any person interested in the trust fund, authorizes a public sale in case of default, by a person appointed as provided; and a purchaser thereat acquires a good title. And the supreme court of Arkansas recently held, in the case of *Stallings v. Thomas*,<sup>2</sup> that under a trust deed authorizing the trustee named therein to sell in case of default, and providing that the beneficiary may substitute another to execute the power in case the trustee named fails or refuses to execute it, a substitution is unauthorized and a sale by a substituted trustee void, where the trustee named was not requested and did not refuse to execute the power.

§ 264c. Same — Same — Where coupled with an interest.—A power of sale conferred upon the mortgagee in a mortgage coupled with an interest, is appurtenant to the estate, and passes to the executors, administrators and assignees of the mortgagee, and is not lost by the death or insanity of the mortgagor,<sup>3</sup> and may be exercised by the

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executors as will authorize them to execute the power, where the trustee has no beneficial interest in the mortgage, under Maryland Code, art. 666, providing that in all mortgages there may be inserted a clause authorizing the mortgagee, or any person to be named therein, to sell the mortgaged premises. *Barrick v. Horner*, 78 Md. 253; s. c. 27 Atl. Rep. 1111.

<sup>1</sup> 17 So. Rep. 519.

<sup>2</sup> 55 Ark. 326; s. c. 16 S. W. Rep. 184.

<sup>3</sup> *Barrick v. Horner*, 78 Md. 253; s. c. 27 Atl. Rep. 1111.

A power of sale in a mortgage, declaring it lawful for the trustee named, his successors and assigns, at any time after default to sell the property mortgaged, is a power coupled with an interest, which may be exercised by a new trustee appointed, upon the release of the trustee named, by the court on his application; especially where the mortgage is assigned to the new trustee by the former one under direction of the court. *Western Maryland R. Land & I. Co. v. Goodwin*, 77 Md. 271; s. c. 26 Atl. Rep. 319.

mortgagee,<sup>1</sup> his assignee,<sup>2</sup> or by the executors or administrators of the mortgagee's estate.<sup>3</sup>

§ 264d. **Same—When sale to be made.**—A sale under the power in a trust deed can not be made until the debt is due,<sup>4</sup> or there is default in some of the covenants of the instrument. In those cases where the debt is due the trustees in a trust have no right to delay a sale after default until a more favorable or convenient season, without the consent of the creditor or beneficiaries.<sup>5</sup>

In those cases in which the instrument creating the trust provides that a sale shall be made upon default only upon the request of a certain person or persons, a sale made without such request will be void; as where the instrument provides for sale by the trustee on the request of the payee, and the request is made by the purchaser of the property at a prior invalid sale, but to whom neither the note nor the deed of trust have been transferred.<sup>7</sup>

It is thought that an order of the orphan's court, or of any other court having charge of the infant's estate, is neither necessary nor proper to enable executors to sell under a power contained in a mortgage.<sup>8</sup>

<sup>1</sup> *Very v. Russell*, 65 N. H. 646; s. c. 23 Atl. Rep. 522.

<sup>2</sup> *Hartley v. Matthews*, 96 Ala. 224; s. c. 11 So. Rep. 452; *Johnson v. Glenn*, 80 Md. 369; s. c. 30 Atl. Rep. 993; *Thurber v. Carpenter*, 18 R. I. 782; s. c. 31 Atl. Rep. 5; *Barry v. Anderson*, 18 Ont. App. 247.

**A power of sale in a mortgage is not personal to the mortgagee**, but passes to an assignee, under the Alabama Code, 1886, § 1884, making it part of the security for the mortgage debt, and providing that it may be executed by any person who becomes entitled to the money. *Hartley v. Matthews*, 96 Ala. 224; s. c. 11 So. Rep. 452.

<sup>3</sup> **Foreign administrator may execute power of sale contained in a mortgage running to the mort-**

gagee, his executors, administrators, and assigns, in Rhode Island. *Thurber v. Carpenter*, 18 R. I. 782; s. c. 31 Atl. Rep. 5.

<sup>4</sup> **A sale under a trust deed is void**, when on the proper statement of account, the lender is indebted to the borrower. *Jackson v. Cassidy*, 68 Tex. 282; s. c. 4 S. W. Rep. 541.

<sup>5</sup> *Wheeler v. McBlair*, App. 5 Cas. D. C. 305; s. c. 23 Wash. L. Rep. 153. See: *Post*, § 264f.

<sup>6</sup> *Whitney v. Krapf*, 8 Tex. Civ. App. 304; s. c. 27 S. W. Rep. 843. See: *Post*, § 264h.

<sup>7</sup> *Boone v. Miller*, 86 Tex. 74; s. c. 23 S. W. Rep. 574.

<sup>8</sup> *Chilton v. Brooks*, 71 Md. 445; s. c. 18 Atl. Rep. 868; 28 Am. & Eng. Corp. Cas. 32.

**§264e. Same—Notice of sale.**—To render a sale valid under a power in a mortgage or trust deed a sufficient notice of sale is necessary;<sup>1</sup> but a sale of land under a power contained in a trust deed is valid, although the notice of sale is published in newspapers other than those designated by the court judges for publication of legal notices, under the statute,<sup>2</sup> for the reason that such statutes and designation of papers thereunder do not apply to sales under power in mortgages and trust deeds, but only to such sales as are made under court proceedings.<sup>3</sup>

It is usual and proper to give notice to the grantor or his assignees of the appointment or election of a new trustee to execute the trust on the death, refusal or incapacity to act of the person originally selected; but it seems that, in the absence of statutory requirement, this is not essential, for the supreme court of California, in the case of *Dyer v. Leach*,<sup>4</sup> say that a failure to give notice to the grantor in a deed of trust, or his grantees, of the appointment by the court of a successor to a deceased trustee, will not, in California, invalidate a sale made by such successor.

**§264f. Same—Duties of person making sale.**—A trustee empowered to sell property under a deed of trust is bound to sell under every possible advantage for the beneficiaries, and must act with fair and impartial attention to the latter's interests; and the sale may be vacated in case of his failure to do so.<sup>5</sup> But such trustee is not bound, besides duly advertising the property for sale thereunder according to its terms, to go out and hunt up bidders,<sup>6</sup> or to give the grantor personal notice of the intended sale,<sup>7</sup> or to inform himself as to the value of the property,<sup>8</sup> or to delay

<sup>1</sup> As to notice of sale and its contents, regularity and sufficiency, see: *Post*, §§ 475, 476.

<sup>2</sup> As in Missouri. See: *Mo. Rev. Stat.*, 1889, § 312.

<sup>3</sup> *Dart v. Bagley*, 110 Mo. 42; s. c. 19 S. W. Rep. 313.

<sup>4</sup> 91 Cal. 191; s. c. 27 Pac. Rep. 598; 25 Am. St. Rep. 171.

<sup>5</sup> *Fowler v. Taylor*, 19 D. C. 456; s. c. 19 Wash. L. Rep. 131.

<sup>6</sup> *Harlin v. Nation*, 126 Mo., 97 s. c. 27 S. W. Rep. 330.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

the sale until a more convenient season ;<sup>1</sup> and his failure to do so is not a ground for setting the sale aside.<sup>2</sup>

A trustee in a deed of trust need not personally attend at a sale thereunder, but may act by others in advertising and auctioneering the land.<sup>3</sup> And a person representing the trustee in a trust deed in advertising and selling the land is not incapacitated by the fact that he is empowered to bid a sum named for the person to whom the sale is made.<sup>4</sup>

**264g. Same—Possession not necessary to the execution of.**—The trustee's possession of the property is not a condition precedent to the sale under a power in a trust deed providing that it shall be his duty, on request, to take the property into his possession and sell it.<sup>5</sup> Neither is it where the instrument provides that "upon default of payment of the debt secured the trustee shall immediately take possession, and, having given notice, sell the land conveyed," because such provisions are intended simply to confer upon the trustee the right of possession, and not to make such taking of possession a condition precedent to the exercise of the power of sale.<sup>6</sup>

**264h. Same—Sale must be in strict accordance with power.**—The general rule is that a sale under a power must be in strict accordance therewith. Thus it is said that a sale by a trustee in a trust deed intended as security, not made in strict accordance with the power of sale contained therein, does not divest the trustor or his grantee of the equitable estate, although it carries with it the legal title; and a second sale after such conveyance of the legal title, although made upon a readvertisement and concluded in strict compliance with the terms of the deed, will be ineffectual to pass such equity.<sup>7</sup>

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<sup>1</sup> *Wheeler v. McBlair*, 5 App. Cas. D. C. 375; s. c. 23 Wash. L. Rep. 153.

<sup>2</sup> *Harlin v. Nation*, 126 Mo. 97; s. c. 27 S. W. Rep. 330.

<sup>3</sup> *Dunton v. Sharpe*, 70 Miss. 850; s. c. 12 So. Rep. 800.

<sup>4</sup> *Id.*

<sup>5</sup> *Hamilton v. Halpin*, 68 Miss. 99; s. c. 8 So. Rep. 739.

<sup>6</sup> *Tyler v. Herring*, 67 Miss. 169; s. c. 6 So. Rep. 840.

<sup>7</sup> *Stephens v. Clay*, 17 Colo. 489; s. c. 30 Pac. Rep. 43.

Where a sale is to be made under a power only upon the request of a designated party or parties, a sale without such request is void.<sup>1</sup> Thus under a deed of trust providing that sale may be made at the request of the payee in the note secured thereby, a sale is void if made at the request of one who has become the purchaser of the property by a prior invalid sale, to whom neither the note nor the deed of trust were transferred.<sup>2</sup> But where the mortgagee is empowered by the mortgage to sell for cash only the fact that he gives the purchaser at the foreclosure sale time in which to make the payment of the purchase price, and takes his note for part of the purchase money, does not render the sale invalid;<sup>3</sup> nor will it entitle the mortgagor to any relief, where he has received proper credit for the sum bid as cash, except that he will be entitled to recover the balance after payment of the debt, expenses and charges.<sup>4</sup>

§264i. **Same—Valid exercise of power.**—A sale under a power cannot be made until the debt is due, or some covenant in the instrument creating the trust is broken,<sup>5</sup> and then to be valid must be conducted strictly in accordance with the provisions of the statute regulating sales under power.<sup>6</sup> Thus, he must make the statutory record of an assignment of the mortgage before exercising the power of sale in the name of the assignee,<sup>7</sup> and the notice of sale must be signed by the proper party and in accordance with statutory requirement.<sup>8</sup>

On collateral attack of the title conferred by sale under a power, it will be conclusively presumed that all the prerequisites to a sale of lands under a trust deed were performed, where the deed of trust expressly provides that the recital in the trustee's deed to the purchaser shall be full evidence of

<sup>1</sup> Whitney v. Krapf, 8 Tex. Civ. App. 304; s. c. 27 S. W. Rep. 843.

<sup>2</sup> Boone v. Miller, 86 Tex. 74; s. c. 23 S. W. Rep. 574.

<sup>3</sup> Sawyer v. Campbell, 130 Ill. 186; s. c. 22 N. E. Rep. 458.

<sup>4</sup> Tompkins v. Drennen, 6 C. C. A. 83; s. c. 56 Fed. Rep. 694.

<sup>5</sup> See: *Ante*, § 264d.

<sup>6</sup> Pierce v. Grimley, 77 Mich. 273; s. c. 43 N. W. Rep. 932.

<sup>7</sup> Burke v. Backus 51 Minn. 174; s. c. 53 N. W. Rep. 458.

<sup>8</sup> Dunning v. McDonald, 54 Minn. 1; s. c. 55 N. W. Rep. 864.



the truth of the matter therein stated, and that all prerequisites to the sale shall be presumed to have been performed.<sup>1</sup> And the mere fact that the enforcement of the legal rights of a beneficiary in a trust deed, by a sale by the trustee under the power contained therein, results in pecuniary loss to the debtor, cannot have the effect of annulling the sale, where it is impartially and fairly made according to the terms of the deed, although the debtor is entitled to the utmost good faith and fairness in the execution of the power.<sup>2</sup> It will be a valid exercise of the power where a mortgagee sells the premises by public auction ostensibly to a third person, but in reality to himself and takes possession as owner under such purchase, and thereafter sells in full proprietary right to another; and the latter sale will extinguish the right to redeem.<sup>3</sup>

§ 264j. **Same—Who may purchase.**—Any one competent and in a position to contract may purchase at a sale of mortgaged premises, on default, under a power; such as the beneficiaries named in the trust deed;<sup>4</sup> the mortgagor and his legal representatives,<sup>5</sup> and even the trustee himself. Thus, we have already seen,<sup>6</sup> it has been held that a sale by a mortgagee who has sold the premises by public auction ostensibly to a third person, but in reality to himself and taken possession as owner, and sold in full proprietary right to another, is a valid exercise of the power contained in the mortgage, and extinguishes the right to redeem.<sup>7</sup>

264k. **Same—Rights of purchasers.**—A trustee in a deed of trust has no power to convey, except in the event of the contingency to which his power is limited,<sup>8</sup> and a purchaser from him acquires no title which will support an

<sup>1</sup> *Jesson v. Texas Land & L. Co.*, 3 Tex. Civ. App. 25; s. c. 21 S. W. Rep. 624.

<sup>2</sup> *Smith v. Deeson* (Miss. 1893), 14 So. Rep. 40.

<sup>3</sup> *Henderson v. Astwood* (P. C.) 1894, A. C. 150.

<sup>4</sup> See: *Stallings v. Thomas*, 55 Ark. 326; s. c. 18 S. W. Rep. 184.

<sup>5</sup> *Chilton v. Brooks*, 71 Md. 445; s. c. 18 Atl. Rep. 868; 28 Am. & Eng. Corp. Cas. 32. This decision was made under Md. Code, art. 66, § 14.

<sup>6</sup> See: *Ante*, § 264i.

<sup>7</sup> *Henderson v. Astwood* (P. C.), 1894, A. C. 150.

<sup>8</sup> See: *Ante*, § 264d.



action to quit title unless the trustee has acquired the power of sale by the happening of such contingency.<sup>1</sup> And it is held that a provision in a deed of trust, declaring that the recitals in a deed of the trustee to a purchaser of the property upon a sale made upon a default, shall be conclusive proof of the default and of due publication of the notice of sale, is not available to a purchaser with knowledge of the want of authority in the trustee to sell by reason of the fact that no default has been made.<sup>2</sup>

It has been said that the rights and duties of the beneficiary named in a trust deed, who purchases the property at an invalid sale by the trustee and enters into possession thereof, are merely the rights and duties of a mortgagee in possession after condition broken.<sup>3</sup>

**264l. Same—Deed on sale.**—In all cases where land is sold under a power conferred in a mortgage deed, the legal title remains in the mortgagor until the deed of conveyance is executed, under the power, by the mortgagee or his assigns in the name of the mortgagor,<sup>4</sup> and a deed in the name of the mortgagee or his assigns will not transfer title to the land so sold.<sup>5</sup>

It has been said that a deed executed under a power of sale in a deed of trust is not invalidated by the fact that the notice of sale required therein was published for part of the required time in one paper and for the remainder in another, where the publication was but the continuation of one notice, the two newspapers having been consolidated during the time of publication of the notice.<sup>6</sup>

**§ 264m. Same—Void and voidable sales.**—A sale under a deed of trust is void, when on the proper statement

<sup>1</sup> *Savings & L. Soc. v. Burnett*, 106 Cal., 514; s. c. 37 Pac. Rep. 180. See: *Post* § 577, *et seq.*

<sup>2</sup> *Savings & L. Soc. v. Burnett*, 106 Cal., 514; s. c. 37 Pac. Rep. 180

<sup>3</sup> *Stallings v. Thomas*, 55 Ark. 326; s. c. 18 S. W. Rep. 184.

<sup>4</sup> *Dendy v. Waite*, 36 S. C. 569;

s. c. 15 S. E. Rep. 712; *Johnson v. Johnson*, 27 S. C. 309; s. c. 3 S. E. Rep. 606; 13 Am. St. Rep. 636.

<sup>5</sup> *Johnson v. Johnson*, 27 S. C. 309; s. c. 3 S. E. Rep. 606; 13 Am. St. Rep. 636

<sup>6</sup> *Wilkerson v. Eilers* 114 Mo 245; s. c. 21 S. W. Rep 514.

of account, the lender is indebted to the borrower.<sup>1</sup> And a sale of mortgaged premises under a power contained in the mortgage, pursuant to a notice which is not signed by an assignee of a part interest in the mortgage, whose assignment is put on record between the first and last days of publication of the notice, is invalid.<sup>2</sup> In those cases where a mortgage confers a power of sale, and a third party purchases for the benefit of the mortgagee, the sale is not absolutely void, but voidable only.<sup>3</sup>

A sale may be avoided for the misconduct of the trustee making the sale; but a statement by one of the trustees in a trust deed, denouncing a bid by one who failed to complete his purchase as a trick, and a question of the representative of the mortgagor as to whether the latter caused it to be done, with a true statement to the attorney of a loan company from which the mortgagor was attempting to obtain a loan to take up the mortgage, of the existence of mechanic's liens, do not constitute misconduct on the part of the trustees which will entitle the mortgagor to relief from the sale.<sup>4</sup> And it is said that a perversion of the power to sell land under a mortgage is not shown by the fact that some advantage may accrue to the mortgagee besides the payment of the debt, or an advantage may accidentally accrue thereby to others.<sup>5</sup>

§ 264n. **Same—Revoked by death.**—A power of sale of mortgaged premises on default, inserted in a mortgage, based on a valuable consideration, cannot be revoked by

<sup>1</sup> Jackson v. Cassidy, 63 Tex. 232; s. c. 4 S. W. Rep. 541.

<sup>2</sup> Dunning v. McDonald, 51 Minn. 1; s. c. 55 N. W. Rep. 864.

**Defects in a sale under a power** contained in a mortgage, which are cured by the lapse of five years by virtue of Minn. Laws 1883, chap. 112, do not include the omission to make the statutory record of an assignment of the mortgage before exercising the

power of sale in the name of the assignee. Burke v. Backus, 51 Minn. 174; s. c. 53 N. W. Rep. 458.

<sup>3</sup> Nichols v. Otto, 132 Ill. 91; s. c. 174; s. c. 23 N. E. Rep. 411.

<sup>4</sup> Anderson v. White, 2 App. Cas. D. C. 408; s. c. 22 Wash. L. Rep. 159.

<sup>5</sup> Holland v. Citizens Sav. Bank 16 R. I. 734; s. c. 19 Atl. Rep. 654, 8 L. R. A. 553.

any act or deed of the mortgagor,<sup>1</sup> but is revoked,<sup>2</sup> or ceases, the instant of his death,<sup>3</sup> and cannot be thereafter executed.<sup>4</sup> In Texas, however, it is held that although the execution of the power of sale in a mortgage is suspended by the death of the mortgagor, it becomes effective and may be exercised at the expiration of four years from the death without administration upon the estate, since under the statute of that State<sup>5</sup> the jurisdiction of the probate court to issue letters is lost at the end of four years.<sup>6</sup>

It is said by the supreme court of South Carolina, in the case of *Williams v. Washington*,<sup>7</sup> that a deed by a mortgagee, executed in his own name, under a power of sale in a mortgage by joint owners of the lands, after such power has been revoked by the death of one of the mortgagors, although ineffective as a deed, will operate as an equitable assignment of the mortgage, so as to enable the guarantee or his assignee to foreclose the mortgage.

§ 2640. Same—Avoiding or setting aside power.—It is thought that courts will not avoid a power given by a mortgagor to his mortgagee to make a sale of the mortgaged lands on default, but will closely scrutinize the sale made thereunder.<sup>8</sup> And a sale under a power in a deed of

<sup>1</sup> *Johnson v. Johnson*, 27 S. C. 309; s. c. 3 S. E. Rep. 606; 13 Am. St. Rep. 636.

<sup>2</sup> *Wilkins v. McGhee*, 86 Ga. 764; s. c. 13 S. E. Rep. 84; *Williams v. Washington*, 40 S. C. 457; s. c. 19 S. E. Rep. 1.

In Georgia a power of sale given by a mortgage is revoked by the death of the mortgagor. *Wilkins v. McGhee*, 86 Ga. 764; s. c. 13 S. E. Rep. 84.

<sup>3</sup> *Rogers' Heirs v. Watson*, 81 Tex. 400; s. c. 17 S. W. Rep. 29.

**Texas rule.**—In the case of *Rogers' Heirs v. Watson*, *supra*, the court say: "At an early day it was held, in the case of *Robertson v. Paul*, 16 Tex. 472, that a sale made in pursuance of a power given in a mortgage after the death of the mortgagor was

void, although the mortgage was given to secure the payment of the purchase money of the mortgaged premises. That decision has been followed in subsequent cases in this court, and may now be regarded as settled law." See: *Abney v. Pope*, 52 Tex. 288; *Black v. Rockmore*, 50 Tex. 94; *McLane v. Paschal*, 47 Tex. 365.

<sup>4</sup> *Johnson v. Johnson*, 27 S. C. 309; s. c. 3 S. E. Rep. 606; 13 Am. St. Rep. 636.

<sup>5</sup> Tex. Rev. Stat., art. 1827.

<sup>6</sup> *Rogers v. Watson*, 81 Tex. 400; s. c. 17 S. W. Rep. 29.

<sup>7</sup> 40 S. C. 457; s. c. 19 S. E. Rep. 1.

<sup>8</sup> *Johnson v. Johnson*, 27 S. C. 309; s. c. 3 S. E. Rep. 606; 13 Am. St. Rep. 636.

trust executed when the grantor has sufficient mental capacity, upon giving thirty days' notice, as therein prescribed, cannot be avoided on the ground that the grantor was temporarily insane and confined in an asylum when the sale was made, and had no guardian, where the deed did not provide against such a summary sale in case of the grantor's insanity, or other unseen misfortune.<sup>1</sup>

§ 265. Breach of payment of installment—Accelerated maturity of debt.—It is not infrequently the case, that a mortgage contains a provision making the whole amount due, at the election of the mortgagee or holder, on the failure to pay an installment of the principal or interest when the same falls due, or upon the breach of other covenants in the instrument. Such provisions are valid and uniformly upheld by the courts. But the court of appeals of New York, in the case of *Hollister v. Stewart*,<sup>2</sup> say where a mortgage has provided that on default of payment of principal or interest the trustees shall take legal proceedings to enforce it, and thereafter provides also that in case of a default in respect to covenants for further assurance, the trustees shall have discretion to enforce or waive the rights of the bondholders, unless required to act by a majority of such bondholders, this discretion cannot be held to apply to defaults in principal or interest.

A condition in a mortgage that if, at the expiration of the time limited for the payment of the installments, there should remain due on the mortgage a named sum, the mortgagor might have the privilege of paying the amount due by giving his note therefor, secured by a mortgage on other real estate, does not prohibit the installments from falling due at the time stipulated, or prohibit a sale under the mortgage to satisfy them when due; but the mortgagor may, in such case, stop the sale by insisting on the terms of the stipulation in the mortgage, and complying therewith.<sup>3</sup>

<sup>1</sup> *Van Meter v. Darrah*, 115 Mo. 153; s. c. 22 S. W. Rep. 30.

<sup>2</sup> 111 N. Y. 644; s. c. 19 N. E. Rep. 782; 20 N. Y. S. R. 941.

<sup>3</sup> *Bacon v. Northwestern Mut. L. Ins. Co.*, 131 U. S. 258; bk. 33 L. ed. 128; 9 Sup. Ct. Rep. 787.

§ 266. **Failure to pay installment of principal.**—In those cases where a mortgage given to secure more than one promissory note is foreclosed to make the amount due on the one first maturing, the decree should preserve the lien of the mortgage as to the subsequently maturing notes, where the petition recites the facts as to the notes secured, gives their dates, amounts, and time of maturity, and prays foreclosure for the first note, and for sale of the real estate on special execution.<sup>1</sup> In those cases, however, where a bill is filed to foreclose a mortgage after the maturity of one note, but before that of another, and the latter note matures before the decree of foreclosure and sale is rendered, the decree may cover both, if a proper foundation therefor has been laid in the bill.<sup>2</sup>

§ 267. **Failure to pay installment of interest.**—In all those cases where a mortgage is security for the payment of the interest as well as of the principal, it may be foreclosed on default in the payment of the interest, in the absence of any special provision on that subject.<sup>3</sup> In such an action a mortgagee who has assigned the bond and mortgage before any payment of interest is due cannot put in the defense that before the assignment the interest was settled with him, but not indorsed, as against the purchaser without knowledge thereof.<sup>4</sup> And a subsequent purchaser of the

<sup>1</sup> *Burroughs v. Ellis*, 76 Iowa 649; s. c. 38 N. W. Rep. 141.

<sup>2</sup> *McLane v. Piaggio*, 24 Fla. 71; s. c. 3 So. Rep. 823.

<sup>3</sup> *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. Rep. 221; s. c. 1 L. R. A. 397; 4 Ry. & Corp. L. J. 362.

**Bondholder may maintain action to foreclose where trustee refuses.** In a case where a railroad mortgage provided that the principal should become due upon default in interest, and, upon request of a majority of the bondholders, that the trustees should foreclose the mortgage; and

upon such request the trustees filed a bill to foreclose in the state courts, which was dismissed for want of jurisdiction; and, before their appeal therefrom was determined, upon request of a bondholder, refused to renew the litigation in the federal court; a suit brought thereby the bondholder in his own name may be sustained to the extent of accrued and unpaid interest. *Beekman v. Hudson River West Shore R. Co.*, 35 Fed. Rep. 3.

<sup>4</sup> *Newton Twp. Bldg. & Loan Assoc. v. Boyer*, 42 N. J. Eq. 273; s. c. 10 Atl. Rep. 876; 7 Cent. Rep. 368.



premises who purchased subject to the bond and mortgage, who has neither paid anything on his purchase nor assumed payment of the bond, and who does not allege that he supposed the interest was paid, can not, in such suit, claim any benefit from the alleged previous payment of interest.<sup>1</sup>

It has been held that conditions inserted in a mortgage, giving the trustees and bondholders power to waive defaults in interest which have continued six months after demand, do not give them any power to anticipate a default and provide for any waiver or extension of time of payment upon such default in the future.<sup>2</sup>

§ 267a. **Same—Stay of foreclosure on.**—The supreme court of New York, in the case of *Trenor v. La Count*<sup>3</sup> say that an action to foreclose a mortgage, in which the plaintiff elects to have the entire sum become due for default in payment of interest for more than thirty days, in accordance with a provision incorporated in the mortgage, will not be stayed simply on the ground that plaintiff's attorneys are unfriendly towards the defendants.

§ 271. **Junior Mortgagee can not compel foreclosure by senior mortgagee.**—It is well settled that a subsequent incumbrancer cannot compel a prior mortgagee to act at all for the enforcement of his lien, any further than to surrender his mortgage on tender of the amount due.<sup>4</sup> Neither can a junior mortgagee maintain a suit to cut off, by foreclosure, the interest of a prior mortgagee.<sup>5</sup>

§ 272. **Joinder of actions.**—Under the statutes of some of the states<sup>6</sup> two deeds absolute in form, but in fact mortgages, given for the benefit of the same parties to secure the

<sup>1</sup> *Newton Twp. Bldg. & Loan Assoc. v. Boyer*, 42 N. J. Eq. 273; s. c. 10 Atl. Rep. 876; 7 Cent. Rep. 368.

<sup>2</sup> *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469; s. c. 18 N. E. Rep. 237; 18 N. Y. S. R. 344; 38 Alb. L. J. 410; 1 L. R. A. 299; 6 Am. St. Rep. 397.

<sup>3</sup> 84 Hun (N. Y.) 426; s. c. 32 N. Y. Supp. 412; 65 N. Y. S. R. 610.

<sup>4</sup> *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 246; s. c. 53 N. W. Rep. 1151. *Lambertville Nat. Bank v. McCready Bag & Paper Co.* (N. J. Ch.), 15 Atl. Rep. 388; s. c. 13 Cent. Rep. 388; 1 L. R. A. 334.

<sup>5</sup> *Rose v. Chandler*, 50 Ill. App. 421.

<sup>6</sup> As under Cal. Civ. Code, § 726.



same indebtedness, but on different property, must be included and foreclosed in the same action.<sup>1</sup> But the general rule is that several causes of action for the foreclosure of separate mortgages on separate lots to secure the payment of separate debts, can not be joined, although the parties to the action are the same.<sup>2</sup> And where one mortgage on several separate lots is given to secure a gross sum, the instrument providing that each lot shall bear its proportionate share, and be discharged upon the payment of that proportionate share, the instrument can not be foreclosed on all the lots in the same action, but there must be a distinct action to foreclose on each lot.<sup>3</sup>

§ 273. Consolidation of actions.—In South Carolina<sup>4</sup> one mortgage by A, and another by A and B, to secure the same debt may be foreclosed in one action, but an action of partition and one for foreclosure of mortgage, cannot be united anywhere.<sup>5</sup> Equity will not permit one tenant in common in the possession of the land to foreclose by separate advertisements three mortgages which he holds upon his co-tenant's interest, all of which are past due.<sup>6</sup> But the foreclosure of different mortgages given by a railway company will not be consolidated where the cases are not, and there is no certainty as to when either one will be ripe for decree; and in case of one being delayed while another is speeded, a consolidation will never be proper.<sup>7</sup>

It seems that after suits to foreclose trust deeds covering different premises and having different trustees, have been consolidated, it is improper to consolidate debts and direct the sale of the premises conveyed by both deeds to pay the entire amount of indebtedness.<sup>8</sup>

<sup>1</sup> Hall v. Arnott, 80 Cal. 348; s. c. 22 Pac. Rep. 200.

<sup>2</sup> See: Tobin v. Smith (Ohio C. P.), 1 Ohio N. P. 75; s. c. 1 Ohio Dec. 675.

<sup>3</sup> See: Child v. Morgan, 51 Minn. 116; s. c. 52 N. W. Rep. 1127 See: *Ante*, § 262a.

<sup>4</sup> Dial v. Gray, 24 S. C. 572.

<sup>5</sup> Belt v. Bowie, 65 Md. 350; s. c. 4 Atl. Rep. 295; 3 Cent. Rep. 727.

<sup>6</sup> Dohm v. Haskin, 88 Mich. 144; s. c. 50 N. W. Rep. 108.

<sup>7</sup> Mercantile Trust Co. v. Missouri, K. & T. R. Co., 41 Fed. Rep. 8; s. c. 7 Ry. & Corp. L. J. 30.

<sup>8</sup> Brown v. Kennicott, 30 Ill. App. 89.

## CHAPTER XIII.

### THE COMPLAINT.

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| <p>§ 274. Form of complaint.<br/>274a. Same—Foreclosure by partnership.<br/>275. Allegations as to claim—Insufficiency.<br/>279. Allegations against mortgagor, subsequent purchaser and co-defendant.<br/>292a. Prayer of complaint—Judgment broader than.</p> | <p>§ 293. Demand for judgment of deficiency.<br/>295. Allegations as to property mortgaged.<br/>297. Defective description.<br/>299. Allegation in foreclosure of indemnity mortgage.<br/>301. Dismissal of complaint—Payment of judgment.</p> |
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§ 274. **Form of complaint.**—In those cases where there is a demand for a foreclosure merely, neither the note secured nor the copy of it need be filed with the complaint;<sup>1</sup> but a complaint seeking to foreclose a mortgage given to secure a note, with a general demand for judgment upon the indebtedness evidenced by the note, is not a complaint for foreclosure simply; and the failure to file therewith a copy of the note is fatal on demurrer.<sup>2</sup> It has been held that in a suit to foreclose a mortgage, where it is averred that the land was the separate estate of the wife, and the conveyance was made by the wife to the husband concurrently with the execution of the mortgage by the husband and wife, it is necessary that the complaint should show that the debt secured by the mortgage was one which the wife had herself contracted, and that it was a debt within her power to contract.<sup>3</sup>

§ 274a. **Same—Foreclosure by partnership.**—It is a well-settled rule of pleading that in a complaint for the

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<sup>1</sup> *Roche v. Moffitt*, 107 Ind. 58 (1885); s. c. 3 N. E. Rep. 940; 2 West. Rep. 254. See: *Wiltzie Mortg. Foreclosures*, (2d. ed.) § 278.

<sup>2</sup> *Id.*

<sup>3</sup> *Jouchert v. Johnson*, 108 Ind. 436

(1886); s. c. 9 N. E. Rep. 413; 6 West. Rep. 880. Citing: *Cupp v. Campbell*, 103 Ind. 213 (1885); s. c. 2 N. E. Rep. 565; 1 West. Rep. 255; *Vogel v. Leichner*, 102 Ind. 55 (1885). (1196)

foreclosure of a mortgage, the plaintiff should show ownership of it either as mortgagee, assignee, or otherwise. In the case of foreclosure by a partnership, it has been said that the existence of the partnership is sufficiently alleged and proved if a complaint in foreclosure alleges that the mortgage was given to certain persons named, who constituted a partnership firm, and the mortgage contains a recital that the persons named were partners, since the execution of the mortgage is an admission by defendants of the existence of the partnership.<sup>1</sup>

§ 275. *Allegation as to claim—Insufficiency.*—In the supreme court of New York, in the case of *Davies v. New York Concert Company*,<sup>2</sup> a complaint by a bondholder in an action to foreclose a mortgage given to secure bonds, stated the amount of the bonds and the times when they became payable, and that they were not paid at maturity; but did not allege that the company neglected or refused to pay them at the place, or in the manner provided; nor that it had been requested to pay them, or had neglected to comply with any such request, or that it was in any manner in default, and was held to be insufficient. In this case the action was brought by a bondholder upon the refusal of the trustee to bring such action, alleging that the company had neglected to perform the covenant to bear, pay, and discharge as soon as the same became due and payable, all taxes, charges, and assessments upon the mortgaged premises, and the court held this insufficient, as it appeared that the trustee was not informed of the default, or requested to commence the action to foreclose the mortgage.<sup>3</sup>

§ 279. *Allegations against mortgagor, subsequent purchaser and co-defendant.*—The supreme court of Indiana, in the case of *Hoes v. Boyer*,<sup>4</sup> say that in those cases where it is shown by the complaint in a foreclosure suit that all the defendants are subsequent purchasers of the mortgaged premises, there must be an averment that they pur-

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<sup>1</sup> *Moses v. Hatfield*, 27 S. C. 324 (1887); s. c. 3 S. E. Rep. 538.

<sup>2</sup> 41 Hun (N. Y.) 492 (1886).

<sup>3</sup> *Id.*

<sup>4</sup> 108 Ind. 494 (1886); s. c. 9 N. E. Rep. 427; 6 West. Rep. 924.

chased with actual notice, or that the mortgage was recorded within the time fixed by the statute, or before the sale and conveyance of the mortgaged property; but where it does not appear from the allegations in the complaint in such a case that any of the defendants are subsequent purchasers, it is not necessary to the sufficiency of the complaint that it should contain an averment that the mortgage has been recorded. And in the same case, the court say that an answer, by one of the defendants in a foreclosure suit, that he was a subsequent purchaser for value and without notice of the mortgage, is a sufficient answer to a complaint in which there is no averment that the mortgage has been properly recorded.<sup>1</sup>

§ 292a. **Prayer of complaint—Judgment broader than.**—In the complaint in a foreclosure proceeding the prayer should distinctly set out the relief demanded, and the judgment should conform to the demands in the prayer. But it has been said that a judgment in a suit to foreclose a mortgage granting relief broader than a prayer in the complaint concerning the barring of rights and claims of parties defendant is not void, but merely irregular and is amendable.<sup>2</sup> In the case of *Brenen v. North*,<sup>3</sup> the prayer of the complaint was that the defendant, Luke Clark, and all persons claiming under him subsequent to the commencement of the action be barred and foreclosed of all right, claim, lien and equity of redemption of said premises. At the time the suit was begun Clark had no interest or estate in the premises, for they had been conveyed by him to the Brodies. The complaint did not pray for any relief barring any other of the defendants than Luke Clark and those claiming under him. The court say: "It is now urged that, under the provisions of the Code of Civil Procedure,<sup>4</sup> the judgment could be no broader than the demand for

<sup>1</sup> Citing: *Martens v. Rawdon*, 78 Ind. 85 (1881).

<sup>2</sup> *Id.*

<sup>4</sup> N. Y. Code Civ. Proc., § 1207.

<sup>3</sup> *Brenen v. North*, 15 N. Y. Law Journal (July 18, 1896), p. 1024.

relief, as the other defendants did not answer in the suit. This defect in the complaint does not render the judgment of foreclosure and sale void. The precise question was considered in the case of *Naughton v. Vion*,<sup>1</sup> where it was held the judgment in a foreclosure action where the relief was broader than the prayer concerning the barring and foreclosing of the rights and claims of parties defendant was not void, but was merely irregular, and that the irregularity could be covered by amendment.

§ 293. Demand for judgment of deficiency.—It is well settled that a personal judgment for deficiency can be rendered by the court only when it is demanded in the prayer to the complaint. Hence the formal prayer of a bill to foreclose a mortgage, for "such other and further relief as equity may require," does not authorize the rendering of a personal judgment against the wife, who joined in the mortgage for the purpose of relinquishing her right of dower.<sup>2</sup>

§ 295. Allegations as to property mortgaged.—The complaint in a mortgage foreclosure should accurately describe the premises it is sought to sell.<sup>3</sup> This description should be full and complete in itself. But it has been said that a reference to a deed for a description of the premises, in the pleadings and process in a mortgage foreclosure, is effective on collateral attack, against a party who admits its sufficiency by filing a plea not denying it, or allowing judgment to go by default.<sup>4</sup> And it has been said that a complaint to foreclose a mortgage and the proceedings founded thereon are not void for uncertainty because of a single misrecital in the description of the land in the complaint.<sup>5</sup>

A description on foreclosure of a legal subdivision in a United States government survey as "south 10 acres," has

<sup>1</sup> 91 Hun (N. Y.) 360 (1895).

<sup>2</sup> *Long v. Herrick*, 26 Fla. 356 (1889); s. c. 8. So. Rep. 50.

<sup>3</sup> See: *McCartney v. Dennison*, 101 Cal. 252 (1894); s. c. 35 Pac. Rep. 766; *Kemp v. Moir*, 45 Ill. App. 490 (1892); *Sherman v. Hanno*, 66 N. H. 160 (1889); s. c. 28 Atl. Rep. 18;

*Birdseye v. Rogers* (Tex. Civ. App. 1894), 26 S. W. Rep. 841; *Thynne v. Sare* (1891); 2 Ch. 79.

<sup>4</sup> *Sherman v. Hanno*, 66 N. H. 160 (1889); s. c. 28 Atl. Rep. 18.

<sup>5</sup> *Birdseye v. Rogers* (Tex. Civ. App. 1894), 26 S. W. Rep. 841.



been said to be sufficient between private persons, although the term "quarter" is ordinarily used by the government in patents of land.<sup>1</sup> It seems, however, that a description of the land as "one hundred acres off the east side of the southeast quarter," of a designated section, where the land is described in the mortgage as "the east side of the southeast quarter," is erroneous.<sup>2</sup>

§ 297. Defective description.—It has been said that a description of the property mortgaged may be sufficiently correct to make a valid conveyance as against the mortgagor, yet be insufficient to authorize a decree of foreclosure and order of sale, when unaided by proper averments in the complaint. Thus it has been held that a foreclosure decree and a deed in pursuance thereof are void for uncertainty where the description of the property makes exceptions of portions previously sold, without showing what such portions are.<sup>3</sup> But a judgment and order of sale on foreclosure describing the entire tract sold, the number of acres, the county in which situated, the name of the tract, the adjoining survey, and the beginning corner, is sufficient.<sup>4</sup>

§ 299. Allegation in foreclosure of indemnity mortgage.—In those cases where a surety has a mortgage on the property of his principal to secure him for signing notes of the latter, after the maturity of the debt, he is not bound to wait until he has actually paid as surety, but may foreclose the mortgage at once; and if the principal is insolvent he may retain any funds in his hands to apply to the discharge of his liability.<sup>5</sup>

§ 301. Dismissal of complaint on payment before judgment.—In many of the states it is provided that where an action is brought for the foreclosure of a mortgage upon real property, the complaint may be dismissed upon pay-

<sup>1</sup> McCartney v. Dennison, 101 Cal. 252 (1894); s. c. 35 Pac. Rep. 766.

<sup>2</sup> Kemp v. Moir, 45 Ill. App. 490 (1892).

<sup>3</sup> Bowen v. Wickersham, 124 Ind. 404 (1890); s. c. 24 N. E. Rep. 983.

<sup>4</sup> Thompson v. Jones (Tex. 1889), 12 S. W. Rep. 77.

<sup>5</sup> Bates v. Wiggin, 37 Kan. 47 (1887); s. c. 14 Pac. Rep. 442.



ment of the amount due on the mortgage. But even in those states a tender of the amount due on a mortgage and all expenses incurred in reference to a sale will not prevent the sale, when other conditions in the mortgage have been broken.<sup>1</sup> But where the mortgage contains a stipulation for attorney fees in case of foreclosure, should the mortgage be placed in the hands of an attorney for foreclosure, and notice is drawn by him and set up in type, the mortgagor cannot stop the foreclosure by paying simply the mortgage; he must also pay the attorney's fees and printer's bills.<sup>2</sup>

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<sup>1</sup> Roberts v. Loyola Perpetual Bldg. Asso., 74 Md. 1; s. c. 21 Atl. Rep. 684.

<sup>2</sup> Mjones v. Yellow Medicine County Bank, 45 Minn. 335; s. c. 47 N. W. Rep. 1072.

## CHAPTER XIV.

### LIS PENDENS—NOTICE OF PENDENCY OF ACTION.

§ 309. When notice of lis pendens to be filed.	§ 319a. Effect of decree of sale on lis pendens.
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§ 309. When notice of lis pendens to be filed.—In many of the States, and particularly in New York, it is provided by statute that the notice of pendency of suit must be filed at the time of the commencement of an action in foreclosure or subsequently thereto, and a certain length of time before final judgment. It has heretofore been held in New York and elsewhere that a notice of *lis pendens* filed before the issuance of the summons is a nullity,<sup>1</sup> or at least does not become effective until the summons is served and the complaint filed. Justice Ingraham says, in the case of *Benson v. Sayre*,<sup>2</sup> that the commencement of an action by the service of the summons is necessary to give validity to the notice for the very good reason that, as stated by Justice Rockwell, in *Burroughs v. Reiger*,<sup>3</sup> “notice of the pendency of a suit before the suit is commenced is a nullity.”

It has also been held by the supreme court of New York, in the case of *Burroughs v. Reiger*,<sup>4</sup> that the filing of a notice of pendency of an action in foreclosure proceedings, or any other action affecting the title to real property, does not affect subsequent purchasers or incumbrancers until the complaint is filed, although the action may have been actually commenced by the service of process. The court say: “The true construction and meaning of the statute is, that although the action may be commenced by the actual service of process, the filing of a notice of the pendency of

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<sup>1</sup> See: *Waring v. Waring*, 7 Abb. (N. Y.) Pr. 473, 475; *Benson v. Sayre*, 7 Abb. (N. Y.) Pr. 472n; *Burroughs v. Reiger*, 12 How. (N. Y.) Pr. 171.

<sup>2</sup> 7 Abb. (N. Y.) Pr. 272n.

<sup>3</sup> 12 How. (N. Y.) Pr. 171.

<sup>4</sup> 12 How. (N. Y.) Pr. 171, 174.  
(1202)

the action shall not affect subsequent purchasers or incumbrancers until the complaint is filed. So that a person who, upon investigating the title in the clerk's office, discovers the notice, may also find, in the same office, the complaint, and ascertain from that the precise nature and scope of the action. But filing the notice before the action is commenced is a nullity. Under the practice before the code, although as against the defendant the suit might be considered as commenced from the issuing, and even for certain purposes from the tests of process, yet an innocent purchaser could only be charged with constructive notice of the pendency of the suit from the time of the service of the process."<sup>1</sup> The doctrine of later cases are thought to limit the rule laid down in *Burroughs v. Reiger*,<sup>2</sup> so that now it seems that a notice of pendency of an action, filed in foreclosure suit before the service of process is ineffectual as against a purchaser in good faith for value, who takes before such service; but is effectual where no change in the title takes place, and no new encumbrances attach in the interval between the filing and the service.<sup>3</sup>

Yet in the recent case of *Brenen v. North*<sup>4</sup> the supreme court of New York hold the fact that the *lis pendens* in a suit to foreclose a mortgage was filed before the filing of the complaint does not constitute a fatal defect, where it does not appear that any right was acquired by anybody as against the property by incumbrance or lien, intermediate the beginning of the suit and the decree and sale thereunder. The court say :

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<sup>1</sup> Citing : *Murray v. Ballow*, 1 John. Ch. (N. Y.) 566; *Hayden v. Bucklin*, 9 Paige Ch. (N. Y.) 512.

Commenting on this language of the Court, Mr. Justice Strong, in *Waring v. Waring*, 7 Abb. (N. Y.) Pr. 472, 475, says: "I concur with the late Judge Rockwell in thinking that it is inoperative as to any defendant, or those claiming under lien through subsequent owners, until a summons has been served upon him either per-

sonally or through advertisement. But with respect for the memory of the learned judge, I do not agree with him that the filing of a notice before the service of a summons would be a nullity."

<sup>2</sup> 12 How. (N. Y.) Pr. 171.

<sup>3</sup> *Tate v. Jordan*, 3 Abb. (N. Y.), Pr. 392. See : *Waring v. Waring*, 7 Abb. (N. Y.) Pr. 472, 475.

<sup>4</sup> 15 N. Y. Law Journal (July, 11, 1896), 1024.

"The premises referred to in the contract belonged, in 1857, to one Luke Clark, who on the first of May of that year, executed a mortgage upon the same to Harriet Thompson, which was subsequently transferred to Edward Brenen. In 1886, Clark and his wife conveyed the premises to Patrick Brodie, who, in the same year, conveyed them to Bridget Brodie. Bridget Brodie died intestate, leaving as her heirs at law a son Thomas (of whom nothing seemed to be known in 1886, whether he was alive or dead or whether he left a widow or children), a daughter Ellen Brodie (since deceased), a daughter Ann Brodie, and grandsons Patrick and Timothy MacDonald, children of Mary Brodie MacDonald, a deceased daughter. In October, 1885, Brenen, the holder of the mortgage made in 1857 by Luke Clark, began an action for the foreclosure and sale of the premises in question, making parties thereto all who were interested in the property, including those who were presumptively heirs at law of Thomas Brodie. Judgment of foreclosure and sale was rendered in that action in February, 1886. The notice of *lis pendens* therein was filed in the office of the clerk of the city and county of New York on the 28th of October, 1885. The complaint was not filed until the 11th day of November, 1885, and this circumstance gives rise to the first objection taken by the defendant to the title. It is claimed that the requirements of section 1670 of the Code of Civil Procedure are imperative, and that in order to make a foreclosure judgment effectual the notice of *lis pendens* must be filed either at the same time that the complaint is filed, or at some subsequent time before final judgment, and that the premature filing of the notice is a fatal defect in the proceeding. It does not appear that any right was acquired by anybody as against this property by incumbrance or lien intermediate the beginning of the suit and the decree and the sale thereunder. By the decree and the deed given under the sale the title of the owner of the equity of redemption and the claims of all other defendants were effectually divested and cut off, and there is no practical question raised respecting the title acquired by the purchaser at the sale. Had there been intervening incum-

brances or liens a different question would be raised, as was the case in *Weeks v. Tomes*.<sup>1</sup> We think therefore that this objection is untenable."

§ 319a. Effect of decree of sale on lis pendens.—The supreme court of Illinois, in the case of *Cochran v. Folger*,<sup>2</sup> say that it cannot be objected that a case is no longer lis pendens after a decree and sale on foreclosure of mortgage and a conveyance executed. The court of chancery is not *functus officio* until the decree is executed by delivery of possession.<sup>3</sup> This was an action in which the purchaser at a mortgage foreclosure sale brought an action for forcible detainer before a justice of the peace, to obtain possession of the land from the mortgagor, and the justice decided that the mortgagor was not guilty of wrongfully withholding the premises from the purchaser; and the court hold that such action of forcible detainer was not a bar to the purchaser's right to apply for and obtain a writ of assistance. The court say: "That suit could not bar any right not then in existence and in regard to which no issue was made before or tried by the justice in that proceeding. Appellee had no right to apply to the circuit judge for this writ, until he had complied with the decree by presenting the appellant the master's deed of the premises with a certified copy of the order of the court confirming the report of the sale. Until he had done this, his right to the possession under the decree had not accrued. The case of *Flowers v. Brown*<sup>4</sup> relied upon by appellant is not an authority to show that the writ of assistance was improperly granted in this case. In that case the mortgagor, after the decree of sale, had entered into a contract for the purchase of the mortgage premises; had obtained further time for payment; had paid part of the purchase money, and the mortgagee, the complainant in the foreclosure suit, had promised to make a deed upon payment of the balance, and having thus acquired a new right to hold the premises, it

<sup>1</sup> 16 Hun (N. Y.), 349.

<sup>2</sup> See *Kessinger v. Whittaker*, 82

<sup>3</sup> 116 Ill. 194; s. c. 5 N. E. Rep. Ill. 22; *Jackson v. Warren*, 32 Ill. 340.

383; 3 West. Rep. 59.

<sup>4</sup> 21 Ill. 270.

was held erroneous to issue a writ to turn him out of possession until his right to a specific performance could be determined. In that case new facts had arisen after the decree, which would have rendered it unjust and inequitable to execute that part of the decree which required the mortgagor to surrender the possession. In this case nothing has occurred since the decree which gives to the mortgagor any just grounds for withholding from appellee the possession of the premises. His right to redeem the premises from sale had expired, and his only pretense for retaining the possession is based entirely upon the supposed advantage which the decision of the justice in the forcible detainer suit gives him. This, as we have seen, is more imaginary than real, and affords no grounds for preventing a court of chancery from executing its decree as right and justice demand. As was said in *Aldrich v. Sharp*<sup>1</sup> 'it is a well established principle that when a court of chancery obtains jurisdiction of the subject matter of a suit, it will retain the jurisdiction to the end that complete justice may be done between the parties. It has the power to decree a sale of the mortgaged premises, and thereby pass the title to the purchaser, and will put him in possession instead of driving him to his action of ejectment. It would be but partial justice to adjudicate upon the rights of the parties and vest the title in the purchaser without affording a remedy to carry the adjudication into full effect. The court having the power to dispose of the title, has the right to control the possession.'"

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<sup>1</sup> 4 Ill. (3 Scam.), 261.



## CHAPTER XV.

### ANSWERS AND DEFENSES.

WHO MAY ANSWER—DEFECT OF PARTIES—ACTION AT LAW ON BOND—DEFECTIVE EXECUTION OF MORTGAGE—INFANCY, INSANITY, IGNORANCE, ALTERATION.

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|----------------------------------------------------------------|------------------------------------------------------------|
| § 320. Generally.                                              | § 327a. Action on bond waiver of mortgage lien when.       |
| 320a. Answer by creditor of mortgagor.                         | 328a. Attachment against mortgagee—Garnisheeing mortgagor. |
| 321. Right of prior lien holders to answer.                    | 330. Denial of execution of mortgage.                      |
| 322. Claimants of interest in equity of redemption may answer. | 333. Allegation of insanity of mortgagor.                  |
| 322a. Same—Subsequent judgment creditors.                      | 336a. Allegation of non-delivery.                          |

§ 320. **Generally.**—The general rule is that on a bill to foreclose a mortgage, any defense may be set up which would be available in an action at law on the note, except the statute of limitations.<sup>1</sup> But claims to a prior and paramount title cannot be set up in an answer to a complaint and litigated in a foreclosure suit;<sup>2</sup> neither can a mortgagor defend against the amount due on his mortgage because the mortgagee had been delinquent in paying off another mortgage which he had agreed to pay, if he has finally procured its satisfaction.<sup>3</sup>

The well-established rule is that any one who is interested in the equity of redemption may answer;<sup>4</sup> yet it is held that under the New Jersey statute,<sup>5</sup> in an action to foreclose a mortgage given by husband and wife for his

<sup>1</sup> Kilpatrick v. Henson, 81 Ala. 464; s. c. 1 So. Rep. 188.

<sup>2</sup> California Safe-Deposit & T. Co. v. Cheney Electric-Light T. & P. Co., 12 Wash. 138; s. c. 40 Pac. Rep. 732. See: *Post*, § 418.

<sup>3</sup> Sergeant v. Aberle, 134 Pa. St. 613; s. c. 47 Phila. Leg. Int. 366; 19 Atl. Rep. 739; 20 Atl. Rep. 26, 26 W. N. C. 87.

<sup>4</sup> See: *Post*, § 322.

<sup>5</sup> N. J. Rev. Stat., p. 638, §§ 10, 11. (1207)

debt, the wife cannot answer separately without leave of the court first duly obtained.<sup>1</sup>

The supreme court of Indiana, in the case of *McBurnie v. Seaton*,<sup>2</sup> say that in an action to foreclose a mortgage to secure four promissory notes set off to the plaintiff out of the estate of her deceased husband, where it was answered that at a prior date the deceased instituted a foreclosure suit on the identical notes and mortgage, a reply that the prior action was prosecuted by the deceased solely in the character of guardian, and that the court did not consider or determine any question except such as related to the right of the decedent in his trust capacity; the court also held that the merits of the case were in nowise involved, and that the complaint was sufficient on demurrer, and that the demurrer should have been sustained to the answer.

§ 320a. **Answer by creditor of mortgagor.**—It is well settled that a mere general creditor without any specific lien, although made a party defendant in a suit to foreclose a mortgage on the debtor's property, for the determination of a lien claimed by him, cannot question the validity of the mortgage.<sup>3</sup> The mortgage cannot be legally questioned by such defendant until he clothes himself with a judgment and execution, or some legal process against the debtor's property; for the reason that creditors can not interfere with the property of their debtors without process.<sup>4</sup>

§ 321. **Right of prior lien holders to answer.**—In those cases where the interests of prior lien holders are fully and correctly set out in a petition to foreclose a junior lien, it is not essential that they put in an answer, where made parties, for the reason that the court will fully protect their interests. But it is held that a lien-holder made defendant in a foreclosure suit, duly served, and failing to

<sup>1</sup> *Pidcock v. Melick*, 43 N. J. Eq. 1890), 8 L. R. A. 691; s. c. 23 Pac. 294; s. c. 14 Atl. Rep. 811; 6 Cent. Rep. 780.

<sup>2</sup> 111 Ind. 56; s. c. 12 N. E. Rep. 101; 9 West Rep. 259.

<sup>3</sup> *Wolcott v. Ashenfelter* (N. M. 1890), 23 Pac. Rep. 780; s. c. 8 L. R. A. 691.

<sup>4</sup> *Thompson v. Van Vechten*, 27 N. Y. 582. See: *Wolcott v. Ashenfelter* (N. M. 1890), 23 Pac. Rep. 780; s. c. 8 L. R. A. 691.

appear, but permitting a decree of foreclosure to be taken, in which the lien is not recognized, cannot, after a sale under the decree, answer setting up his lien, unless he shows sufficient cause for delay.<sup>1</sup>

In those cases where prior mortgagees becoming parties to an action of foreclosure upon a junior mortgage, by filing cross-complaints for the foreclosure of their mortgages, are entitled to priority in rents received by a receiver appointed in the action before they became parties thereto, without asking such relief in their complaint.<sup>2</sup>

§ 322. Claimants of interest in equity of redemption may answer.—The United States circuit court for the southern district of Iowa,<sup>3</sup> hold that a company who has succeeded to the redemption right of the original mortgagor, and is entitled to perfect its title to the property by paying off the amount due upon another mortgage, has a direct interest in the amount due upon the latter, and may be heard as to the validity of any bonds on which a claim is made under the latter mortgage.

It is said that a devisee of the mortgaged property, or his creditor, whose whole interest is derived from the will of the mortgagor, cannot attack a mortgage made to a city in consideration of its canceling certificates of the sale to it of the property for taxes, on the ground that it had no power to take such mortgage.<sup>4</sup> But in a foreclosure proceeding by a legatee of a mortgagee against a purchaser of the equity of redemption at a sale by the mortgagor's assignee in bankruptcy, any defense may be made that would be admissible in a foreclosure suit between the original parties to the note and mortgage.<sup>5</sup>

The supreme court of Louisiana hold that a purchaser of property subject to a mortgage containing the *pact de non*

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<sup>1</sup> Graves v. Fritz, 24 Neb. 375; s. c. 38 N. W. Rep. 819.

<sup>2</sup> Jefferson v. Edrington, 53 Ark. 576; s. c. 14 S. W. Rep. 903.

<sup>3</sup> Simmons v. Taylor, 38 Fed. Rep. 682.

<sup>4</sup> Buffalo v. Balcom, 134 N. Y. 532; s. c. 32 N. E. Rep. 7; 47 N. Y. S. R. 907.

<sup>5</sup> Clark v. Clark, 62 N. H. 267.

*alienando* stands, with regard to the mortgagee, in the position of a mortgagor, and can make no objection to the seizure and sale, on the ground of its non-acceptance, which could not have been made by the mortgagor.<sup>1</sup>

§ 322a. Same—Subsequent judgment creditors.—The supreme court of Alabama say that subsequent judgment creditors made parties in an action to foreclose a mortgage constituting a first lien on the mortgaged lands have no such interest as will entitle them to compel the mortgagee to exhaust his lien on personal property also covered by the mortgage before proceeding to foreclose it upon the lands, where all of the property covered thereby is insufficient to pay in full the various paramount mortgage liens;<sup>2</sup> neither have they an interest therein entitling them to set up a homestead right in the lands, where the claim of homestead is not raised by the mortgagor or any of the mortgagees.<sup>3</sup> It is said, in a New Jersey case,<sup>4</sup> and the rule is thought to be sound in principle, that the holder of a lien subsequent to a junior mortgage has no standing to move to dismiss a bill to foreclose the junior mortgage because the bill seeks to have the junior mortgage given a preference in payment over the prior mortgage.

§ 327a. Action on bond waiver of mortgage lien when.—It is thought that where the holder of a note secured by mortgage sues upon the note without asking a foreclosure and obtains a writ of attachment against the debtor's property upon affidavit that the mortgage has become nugatory, which affidavit is made necessary by statute to warrant an attachment, he thereby waives his mortgage lien.<sup>5</sup>

§ 328a. Attachment against mortgagee—Garnisheeing Mortgagor.—It has been held in the Pennsylvania

<sup>1</sup> Citizens' Bank of Louisiana v. Webre, 44 La. Ann 334; s. c. 10 So. Rep. 728.

<sup>2</sup> Moses v. Home Bldg. & L. Assoc., 100 Ala. 465; s. c. 14 So. Rep. 412.

<sup>3</sup> *Id.*

<sup>4</sup> Sergeant v. Mettler, 43 N. J. Eq. 418; s. c. 6 Atl. Rep. 662; 4 Cent. Rep. 861.

<sup>5</sup> Bacon v. Raybould, 4 Utah 357; s. c. 10 Pac. Rep. 481; 11 Pac. Rep. 510.

court of common pleas,<sup>1</sup> that a plea alleging a foreign attachment was previously issued against the owner of the mortgage, and that defendant was summoned as garnishee, thereby preventing him from paying the debt, is not a good defense upon a *scire facias* on the mortgage, although such facts will be considered by the court in controlling the judgment and protecting the garnishee from the multiplicity of processes.

§ 330. **Denial of execution of mortgage.**—It is thought that in a suit to foreclose a mortgage given by a corporation a judgment creditor of such corporation cannot set up as a defense that there was no resolution of the stockholders for its issuance, or that it was not recorded, particularly where such creditor did not obtain judgment until after the foreclosure suit was begun.<sup>2</sup>

§ 333. **Allegation of insanity of mortgagor.**—The supreme court of Missouri, in the case of *Blount v. Spratt*,<sup>3</sup> hold that the grantee in a deed of trust executed by the grantor to secure money loaned her husband, cannot be enjoined from selling the land embraced therein, on the ground of the grantor's insanity, where he took the deed in good faith and without knowledge thereof, and the parties cannot be put in *statu quo*.<sup>4</sup>

§ 336a. **Allegation of non-delivery.**—It is held that a plea of non-delivery of a mortgage is a good defense in an action for its foreclosure.<sup>5</sup> The court say: "That in an

<sup>1</sup> *Atkinson v. Mackey*, 3 Pa. Dist. Rep. 634.

<sup>2</sup> *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.*, 68 Fed. Rep. 412.

<sup>3</sup> 113 Mo. 48; s. c. 20 S. W. Rep. 967.

<sup>4</sup> A deed or contract by an insane person will usually be held invalid; but while this is the general rule, the mere fact that a party to an agreement was a lunatic will not operate to as a defense to its enforcement or as a ground for its cancellation. Mr. Pomeroy says: "Where a conveyance

or contract is made in ignorance of the insanity with no advantage taken, and with perfect good faith, a court of equity will not set it aside if the parties cannot be restored to their original position, and injustice would be done."

2 Pom. Eq. Jur. (— ed.) § 946.

See: *Gribben v. Maxwell*, 34 Kan. 10; s. c. 7 Pac. Rep. 584; *Insurance Co. v. Hunt*, 79 N. Y. 544; *Wirebach v. Bank*, 97 Pa. St. 549; s. c. 6 Am. & Eng. Encyc. of L. 136; 1 Story Eq. Jur. (— ed.) § 228.

<sup>5</sup> *Ault v. Blackman*, 8 Wash. 624; s. c. 36 Pac. Rep. 694.



action to foreclose a mortgage, a plea of non-delivery by the mortgagor or non-acceptance by the mortgagee is a good defense to the action we think does not admit of doubt. No case is cited to the contrary by the appellant, and we believe none can be found. Indeed, a denial of the execution and delivery of the mortgage in such cases is classed by the courts and text-writers as one of the general defenses to the action.<sup>1</sup> But it is said that such a defense can not be interposed by a judgment creditor of a corporation in an action to enforce a mortgage given by the corporation, in order to assert the invalidity of the mortgage, on the grounds that there was no resolution of the stockholders authorizing the mortgage and that the mortgage was not recorded, particularly where the creditor did not procure judgment until after the instituting of the proceedings in foreclosure.<sup>2</sup>

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<sup>1</sup> See: Boone on Mortg., § 181; 2 Jones on Mortg., § 1479; 5 Wait Prac. p 203.

<sup>2</sup> Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co., 68 Fed. Rep. 412.



## CHAPTER XVI.

### ANSWERS AND DEFENSES.

CONSIDERATION—USURY—DEFENSES AGAINST ASSIGNEE OF MORTGAGE, AND  
AGAINST PURCHASER OF NEGOTIABLE PAPER SECURED BY MORTGAGE.

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| <p>§ 337. Want of consideration.</p> <p>337a. Same—Mortgage to defraud creditors.</p> <p>337b. Same — Embezzlement of proceeds by agent receiving loan.</p> <p>338. Partial failure of consideration.</p> <p>340. Mortgage securing future advance or actual consideration.</p> | <p>§ 342. Defense of illegal or void consideration.</p> <p>344. Usury as a defense.</p> <p>344a. Same—What amounts to usury.</p> <p>346. Who may avail themselves of the defense of usury.</p> <p>347. Defenses against assignee of mortgage.</p> |
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§ 337. Want of consideration.—Want of consideration is a good defense in a foreclosure suit between the original parties, and it cannot be rebutted by evidence that the mortgage was made to defraud the creditors of the mortgagor.<sup>1</sup> It is also a defense as against an assignee, and even if he is a *bona fide* purchaser he is not exempt from the defense of want of consideration.<sup>2</sup> But defenses of want of consideration, extinguishment by remission, prematurity resulting from inexpiration of extension of time granted are inconsistent and inadmissible.<sup>3</sup>

It has been held that an affidavit of defense in an action for the foreclosure of a mortgage is sufficient where, by proper averments, it alleges that the mortgage was executed in contemplation of a conveyance of the property, which was never made, and that it was delivered in escrow to await the consummation of such conveyance, and was never

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<sup>1</sup> Clark v. Clark, 62 N. H. 267.

<sup>2</sup> Briggs v. Langford, 107 N. Y. 630; s. c. 14 N. E. Rep. 502; 10

Cent. Rep. 270. See: Bush v. Lathrop, 22 N. Y. 535.

<sup>3</sup> Citizens' Bank v. Benachi, 38 La. An. 376. (1213)

delivered to the mortgagee, but turned over to his representatives after his death.<sup>1</sup>

It is thought that in all those cases where land is mortgaged without consideration, to enable the mortgagee as agent of mortgagor to negotiate the mortgage, the want of consideration is no defense to an action by an assignee for a valuable consideration.<sup>2</sup> And the supreme court of Pennsylvania say that, in *scire facias*, to foreclose a mortgage it is no defense that the legal plaintiff gave no consideration; the mortgagor must prove that the equitable plaintiff gave no consideration.<sup>3</sup> It is, though, the fact that a mortgagor was influenced by friendly advice to make a settlement, in which he executed a mortgage for a balance found due from him, is not, in the absence of fraud upon the part of the person giving the advice, a defense to the foreclosure of the mortgage in favor of such person.<sup>4</sup>

§ 337a. Same — Mortgage to defraud creditors.— Where the mortgagee attempts, against the will of the mortgagor, to foreclose a mortgage given without consideration and to defraud creditors, and to apply the property in satisfaction thereof, the mortgagor may show in opposition the real nature of the transaction and the want of consideration.<sup>5</sup> For, as has been recently said, a mortgagor is not denied the right of defense for lack of consideration,—at least as against any other than a *bona fide* assignee of the mortgage,—because the mortgage was made with a fraudulent design to prevent a creditor from collecting an expected deficiency judgment on foreclosure of a mortgage on other property.<sup>6</sup> But one who takes a mortgage from a grantee who purchased the land subject to a prior recorded mort-

<sup>1</sup> Morgan v. Morgan, 166 Pa. St. 450; s. c. 31 Atl. Rep. 130.

<sup>2</sup> Thompson v. Humboldt Safe Deposit & Trust Co. (Pa.), 9 Atl. Rep. 511; s. c. 8 Cent. Rep. 259.

<sup>3</sup> *Id.*

<sup>4</sup> McLane v. Piaggio, 24 Fla. 71; s. c. 3 So. Rep. 823.

<sup>5</sup> Bickford v. Johnson, 36 Minn. 123; s. c. 30 N. W. Rep. 439; Hill v. Hoole, 116 N. Y. 299; s. c. 22 N. E. Rep. 547; 26 N. Y. S. R. 657; 5 L. R. A. 620.

<sup>6</sup> Hill v. Hoole, 116 N. Y. 299; s. c. 22 N. E. Rep. 547; 5 L. R. A. 620; 26 N. Y. S. R. 657.

gage cannot object that a transfer of the prior mortgage was fraudulent as against the creditors of the grantor.<sup>1</sup>

§ 337b. Same—Embezzlement of proceeds by agent procuring loan.—It is said that where the application for a loan states that the applicant agrees to pay the person through whom the application is made a certain fee, as his attorney, for taking the application, making the abstract of applicant's title to the land offered as security, and "securing and paying over the money," the lender is justified in paying to such attorney; and the latter's embezzlement of the funds will constitute no defense to the mortgage.<sup>2</sup> In the course of the discussion in the case of *American Mortgage Co. v. King*, just cited, the Alabama supreme court say: "The uncontroverted facts show that the notes of complainant, made payable to the respondent, the American Mortgage Company of Scotland, Limited, and secured by his mortgage, were forwarded to and received by the latter, and in consideration thereof it furnished the amount of money agreed to be loaned. Whatever may be the relations of the Alabama Land Company and Manghen to complainant, the borrower, under the facts, the respondent, the American Mortgage Company of Scotland, Limited, was fully authorized to pay the money for the complainant as authorized by him. The proof on this point is fuller than it was in the case of *Guin v. New England Mortgage Security Company*,<sup>3</sup> in which it was declared, under like circumstances as in the present case, that the money was paid over to the agent of the borrower. We are not able to draw a distinction favorable to complainant between the case at bar and that of the *Edinburgh American Land Mortgage Company v. Peoples*.<sup>4</sup> The same agent (Manghen) acted in that as in the present case. The application of the borrower (*Peoples*) in that case contained the following provision, which

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<sup>1</sup> *Newton v. Manwarring*, 10 N. Y. Supp. 347; s. c. 32 N. Y. S. R. 389.      *ited, v. Peoples (Ala.)*, 14 So. Rep. 656.

<sup>2</sup> *American Mortgage Co. v. King* (Ala.), 16 So. Rep. 889; *English American Land Mortgage Co., Lim-*

<sup>3</sup> 92 Ala. 135; s. c. 8 So. Rep. 388.

<sup>4</sup> 14 So. Rep. 656.

is in the present application: 'I agree to pay J. W. V. Manghen, as my attorney, a reasonable fee for taking this application, conducting correspondence, and making ample abstract of title to my land, and in securing and paying over the money.' The court used this language: 'This power and authority authorized Manghen, as the agent and attorney of Peoples, to receive the money from the loan company, and Peoples must bear the loss of his fraud and embezzlement.' The cases are precisely alike."

§ 338. **Partial failure of consideration.**—A partial failure of consideration is always a defense *pro tanto*; but such failure, to be available as a defense, must be distinctly pleaded and supported by the evidence. It has been said, however, that a breach of a verbal agreement against incumbrances does not furnish a defense to a suit to foreclose a mortgage for the purchase money of real estate.<sup>1</sup>

In all those cases where an action is brought to foreclose a mortgage given on other land by a vendee to secure a land contract, the failure of title in the vendor, and an adverse possession under purchase from the owner for more than twenty years, furnish a valid defense.<sup>2</sup> But it is not a valid defense to an action of foreclosure under a statute,<sup>3</sup> authorizing affirmative relief, that certain of the defendants have failed to perform an agreement entered into by them with the mortgagor on her conveying the property to them, to advance moneys to pay debts and interest on the mortgage in suit, and to reconvey on repayment of advances.<sup>4</sup>

It is thought that a mortgagor cannot defeat the foreclosure of a mortgage by the defense that the deed executed to him, which was the consideration of the mortgage, did not contain all the land to which he was entitled, where he has elected to pursue another remedy by bringing an action to reform the deed, in which a reformation of the deed so as to include all the land he purchased has been decreed.<sup>5</sup>

<sup>1</sup> Jewell v. Bannon, 12 Pa. Co. Ct. 399.      Cranwell, 32 N. Y. S. R. 376; s. c.

<sup>2</sup> Cook v. Rounds, 60 Mich. 310;      10 N. Y. Supp. 404.

s. c. 27 N. W. Rep. 517.

<sup>5</sup> Crescent Mining Co. v. Wasatch

<sup>3</sup> As N. Y. Code Civ. Prac. § 521.      Mining Co., 151 U. S. 317; bk. 38

<sup>4</sup> Mutual Life Insurance Co. v.      L. ed. 177; s. c. 14 Sup. Ct. Rep. 348.

§ 340. **Mortgages securing future advances—Actual consideration.**—In an action for the foreclosure of mortgages given by the mortgagor to secure certain advances, or, in case they should be held to be invalid, then for the foreclosure of mortgages previously given by the mortgagor in escrow for the mortgagee, to secure the sum advanced, it is error to include in the decree other advances than those secured by the mortgages sought to be foreclosed, which were to be made or procured in case the original amount secured by the mortgages was not sufficient for the purposes for which the original loan was made.<sup>1</sup> And ordinarily a mortgagor in possession under a warranty deed cannot set up an outstanding title or breach of the covenants as a defense to a bill of foreclosure brought by the vendor for the unpaid purchase money; his remedy is by action at law on the broken covenant.<sup>2</sup>

§ 342. **Defense of illegal or void consideration.**—The rule is that a mortgage executed upon an illegal consideration is void *ob initio*, for the reason that the nullity of the principal debt destroys all securities accompanying it; yet it is held that illegal consideration, duress,<sup>3</sup> and coverture of one of the mortgagors are personal defenses, and are not available on foreclosure in favor of the purchasers of the equity of redemption.<sup>4</sup>

§ 344. **Usury as a defense.**—In an action to foreclose a mortgage, the mortgagor may show that the consideration of the bond secured by the mortgage is tainted with usury.<sup>5</sup> But in those jurisdictions where a usurious contract is not void, the creditor merely forfeiting his interest on the principal, usury in a debt secured by mortgage does not avoid a sale made under the decree foreclosing such mortgage leaving a large deficiency unpaid.<sup>6</sup>

<sup>1</sup> McComb v. Barcelona Apartment Assoc., 31 N. Y. S. R. 325; s. c. 10 N. Y. Supp. 546; McComb v. Cordova Apartment Asso., 31 N. Y. S. R. 334.

<sup>2</sup> Randall v. Bourguardez, 23 Fla. 264; s. c. 11 Am. St. Rep. 379; 2 So. Rep. 310.

<sup>3</sup> See: *Post*, § 372.

<sup>4</sup> West v. Miller, 125 Ind. 70; s. c. 25 N. E. Rep. 143.

<sup>5</sup> Arrington v. Jenkins, 95 N. C. 462.

<sup>6</sup> Ferguson v. Soden, 111 Mo. 208; s. c. 19 S. W. Rep. 727.



In those cases where the defense of usury is sustained the decree in a foreclosure case which holds that a sum which was usury was retained from the loan must recite sufficient facts to enable the appellate court to draw the conclusion that the sum so retained was usurious.<sup>1</sup>

§ 344a. Same—What amounts to usury.—It is too well settled to require citation of the authorities that where a borrower employs an agent to procure for him a loan, and that agent receives the money from the lender and turns it over to the borrower, less his commission for carrying through the transaction, there is no usury, in the absence of collusion between the lender and the agent, and a sharing in the profits of the loan by the former. On parity of principle it is held that a borrower who has permitted one whom he employed to procure a loan to advance his own money and retain such commission therefor as if he had obtained the money from a third person, gives the transaction the same force as though he had actually paid the commission; and this payment cannot be contested on foreclosing a mortgage for the loan.<sup>2</sup> In the case of *Cohen v. Waldon*,<sup>3</sup> a defense was introduced to avert a threatened foreclosure of a mortgage on the property. The defendant had this transaction with the plaintiff: Upon payment of the mortgage debt less ten per cent. discount, the plaintiff took an assignment of the mortgage; with the knowledge of plaintiff defendant paid the mortgagee the ten per cent. balance, whereupon the plaintiff extended the mortgage for another year. In the action to foreclose the defendant pleaded usury. In rendering the decision of the court Judge Pryor said: "Upon its face the transaction is clear of usury. In form it is a purchase of a valid, subsisting security; and by all authorities, such a purchase, at any discount, may be made with impunity."<sup>4</sup> In every circumstance the case is identical

<sup>1</sup> *Drennan v. Huskey*, 31 Ill. App. 208.

<sup>2</sup> *Watson v. Sawyer*, 12 Wash. 35; s. c. 40 Pac. Rep. 413; 41 *Id.* 43; *Hill v. Sawyer*, 12 Wash. 568; s. c. 40 Pac. Rep. 414.

<sup>3</sup> 15 N. Y. Law Journal (July 7, 1896,) p. 987.

<sup>4</sup> *Dunham v. Cudlipp*, 94 N. Y. 129; *The Union Dime and Savings Bank vs. Wilmot*, 94 N. Y. 221.



with *Siewert v. Hamel*,<sup>1</sup> and unless it appear that the ostensible sale of the mortgage was 'a mere contrivance to evade the statute of usury, and was in fact a loan by the plaintiff to Waldon,'<sup>2</sup> no defense to the action was developed. It is not enough that 'the plaintiff entered into the transaction for the purpose of securing more than the legal rate of interest on his capital,'<sup>3</sup> but 'a loan of money by the plaintiff to the defendant, with the bond and mortgage as collateral, under the guise and color of a purchase and sale of a chose in action'<sup>4</sup> must be shown by 'clear and satisfactory evidence.'<sup>5</sup> In *Siewert v. Hamel*<sup>6</sup> a test of the illegal character of the transaction, as propounded by Andrews, C. J., is that 'it originated in an agreement for a loan;' but here the fact is not clear upon the proofs. By the testimony of Hirsch, the only witness not open to suspicion of bias, it appears that the plaintiff contemplated a purchase from the beginning of the negotiation with the defendant. The defendant himself, in his original answer, alleged that he 'did request the plaintiff to purchase the aforesaid mortgage and take an assignment thereof.' Notwithstanding the explanatory evidence introduced to extenuate the effect of this admission, I cannot but regard it as credible and cogent proof of the intended transaction. Assuming, however, that the parties originally contemplated a loan by plaintiff and a new mortgage to him for security, the proof is quite conclusive that they abandoned the project and substituted instead a purchase and assignment of the mortgage. 'No doubt the plaintiff wanted to get more for his money than simple interest. But he knew the statute of usury, and did not intend to come within it. No doubt, also, there was then suggested a plan whereby he might keep outside of the statute and still obtain a return for his investment greater than the rate allowed by it. There is no law against that.'<sup>7</sup> In one sense the transaction took this form for the

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<sup>1</sup> 91 N. Y. 199.

<sup>2</sup> *Id.* p. 201.

<sup>3</sup> *Id.* p. 201.

<sup>4</sup> *Id.* p. 201.

<sup>5</sup> *White v. Benjamin*, 138 N. Y. 623; s. c. 33 N. E. Rep. 1037.

<sup>6</sup> 91 N. Y. 199.

<sup>7</sup> *Dunham v. Cudlipp*, 94 N. Y. 135.

purpose of escaping usury. But the parties had a perfect right to deal with each other with the usury laws before their eyes, and to so shape the transaction as to escape the condemnation of those laws.<sup>1</sup> The assent of defendant to the substituted arrangement is apparent from his execution of the agreement of November 2d, 1894, and other evidence. Defendant's position, then, is this—he does not impugn the legality of the actual transaction, but urges that the agreement between the parties was for another and illegal transaction, which though renounced and unexecuted, nevertheless invalidates its substitute, the actual and legal transaction. The bare statement of the proposition suffices for its refutation. In *Wyeth v. Braniff*<sup>2</sup> the authority upon which defendant relies, the loan was indisputable—an essential fact, absent from the case under review. 'If there was no loan, and no corrupt agreement for forbearance, there can be no usury.'<sup>3</sup> The case is not free from doubt, but, mindful of the proof requisite to show usury, I am not content that the defense is established. 'The defense of usury being an affirmative proposition to be established by the defendant, he assumes the burden of establishing it by affirmative proof, as all the presumptions are in favor of the legality of the contract; and if, upon the whole case, the evidence is as consistent with the absence as the presence of usury, the party alleging the usury must fail.'<sup>4</sup> This is sound in principle.

§ 346. Who may avail themselves of the defense of usury.—The plea of usury can not be set up in a foreclosure proceeding by one who buys merely the equity of redemption subject to the mortgage;<sup>5</sup> especially in those cases where the mortgagor himself has waived the defense,<sup>6</sup>

<sup>1</sup> *Union Dime and Savings Bank v. Wilmot*, 94 N. Y. 221, 227.

<sup>2</sup> 84 N. Y. 627.

<sup>3</sup> *Sweeney v. Peaslee*, 17 N. Y. Supp. 225, 227; *Meaker v. Fiero*, 145 N. Y. 165; *Siewert v. Hamel*, 91 N. Y. 201.

<sup>4</sup> *Sweeney v. Peaslee*, 17 N. Y.

Supp. 225, 227; *Stillman v. Northrup*, 109 N. Y. 473; s. c. 17 N. E. Rep. 379

<sup>5</sup> *Hill v. Alliance Building Co. (S. D.)*, 60 N. W. Rep. 572; *Black v. Reno*, 59 Fed. Rep. 917

<sup>6</sup> *Black v. Reno*, 59 Fed. Rep. 919.

for the reason that the defense of usury is a personal defense which can be interposed only by the borrower or his legal representative or heirs, and not by subsequent judgment creditors seeking to set up such usury for the purpose of having the mortgaged property subjected to their claims;<sup>1</sup> or by a mere purchaser of an equity of redemption who assumes the mortgage as a part of the purchase price.<sup>2</sup> Neither can the defense of usury be set up by a *terre-tenant*,<sup>3</sup> a married woman who joined in the mortgage but afterwards conveyed,<sup>4</sup> a second mortgagee,<sup>5</sup> or a purchaser subject to the mortgage without assuming it, with whom the mortgagor agreed for a good consideration to defend him against the mortgage to the extent of the usurious excess and failed to do so.<sup>6</sup>

§ 347. Defenses against assignee of mortgage.—In an action to foreclose a mortgage, brought by an assignee thereof, any defense that would have been admissible against the mortgagee is admissible in a foreclosure suit under a mortgage assigned to plaintiff by the mortgagee's

<sup>1</sup> *Moses v. Home Bldg. & L. Assoc.*, 100 Ala. 465; s. c. 14 So. Rep. 412.

<sup>2</sup> *McKnight v. Phelps*, 37 Neb. 858; s. c. 56 N. W. Rep. 722.

<sup>3</sup> A *terre-tenant* of mortgaged premises under warranty of title cannot in Pennsylvania avail himself of the defense usury on *scire facias* to foreclose the mortgage on his land given by his grantor; and he cannot become a party defendant for the purpose of setting up such defense. *Bonnell's Appeal* (Pa.). 5 Cent. Rep. 738.

<sup>4</sup> A married woman, joined with her husband in executing a mortgage on her real estate, and afterwards conveyed to another who conveyed to her husband. On a *scire facias* to foreclose the mortgage, the wife was joined as co-defendant with her husband. The court held that, as

to her, the action was *in rem*, and that she was not interested in the result of the suit so as to set up the defense of the payment of usurious interest by the husband. *Broomell v. Anderson* (Pa.), 8 Atl. Rep. 764; s. c. 6 Cent. Rep. 723.

<sup>5</sup> In those States where the statute does not declare a usurious mortgage void, as in Illinois, but only the stipulation for interest, a second mortgagee, whose mortgage has not been foreclosed, and who has not been let into possession under his mortgage, cannot interpose the defense of usury in a first mortgage to a bill to foreclose that mortgage. *Union Nat. Bank v. Bauer*, 123 Ill. 510; s. c. 14 N. E. Rep. 859; 12 West. Rep. 773.

<sup>6</sup> Such purchaser cannot, against the will of the debtor, interpose such de-

personal representatives after the mortgage became due,<sup>1</sup> and it has even been held that in proceedings to foreclose a mortgage brought by an assignee before maturity of the notes secured thereby, the mortgagor may interpose any defense of which he might have availed himself as against the payee of the notes.<sup>2</sup>

A mortgagor cannot, in an action to foreclose a mortgage controvert the title of the plaintiff on the ground of assignment from himself as administrator to himself as an individual, as the assignment is merely voidable at the election of the next of kin.<sup>3</sup> Neither is it a defense to the foreclosure of a mortgage by an assignee, that the assignment was made in payment of a gaming debt, since the gaming contract is fully executed, and any remedy which the assignor may have does not concern the mortgagor, who is fully protected by the assignment.<sup>4</sup> And mortgagors who have not paid a mortgage which has been assigned by a life insurance company to secure policy holders, in an action by the assignee thereof to foreclose the same, cannot question whether a statute authorizes the security of policy-holders in the manner provided in the instrument of assignment, where there is no other party who can require payment.<sup>5</sup>

fense in a *scire facias sur mortgage*, as *quassi* assignee of the right given by the statute to the debtor himself. The remedy of such purchaser is at law against the mortgagor for breach of contract. *Stayton v. Riddle*, 114 Pa. St. 464; s. c. 7 Atl. Rep. 72; 5 Cent. Rep. 472.

<sup>1</sup> *Robeson v. Robeson* (N. J. Ch.), 23 Atl. Rep. 612. See: *Barry v. Guild*, 126 Ill. 439; s. c. 18 N. E. Rep. 759; 2 L. R. A. 334; affg. 28 Ill. App. 39.

<sup>2</sup> *Barry v. Guild*, 126 Ill. 439; s. c. 18 N. E. Rep. 759; 2 L. R. A. 334, affirming 28 Ill. App. 39.

<sup>3</sup> *Read v. Knell*, 143 N. Y. 484; s. c. 39 N. E. Rep. 4; 62 N. Y. S.R. 847.

<sup>4</sup> *Reed v. Bond*, 96 Mich. 134; s. c. 55 N. W. Rep. 619.

<sup>5</sup> *Gray v. Waldron*, 101 Mich. 612 (1894); s. c. 60 N. W. Rep. 288.

**Assignment of mortgage by a corporation, outside of its domicile, to secure policy holders.**—In the above case the defendant executed to the Anchor Life Insurance Company of New Jersey, a bond and mortgage, and the insurance company assigned the mortgage to Ludlowe Patten, of New York. said assignment being executed wholly within the plots of New York, and which assignment was duly recorded in the county where the land is situated. Mr. Patten and wife assigned the mortgage to Josephine Levy, Jr.

It has been said that a plea in a mortgage foreclosure suit averring that an assignee of the complainant sued to foreclose the mortgage, averring in his bill an assignment from complainant to him, and that such suit was decided in favor of defendant, does not show that complainant had any connection with such suit, or that there was any privity between him and the alleged assignee, and therefore fails to state a good defense.<sup>1</sup> The question whether the plaintiff in an action to foreclose a mortgage is a *bona fide* purchaser of the mortgage is immaterial, where there is no claim which could have been set off against the mortgage in the hands of the original mortgagee.<sup>2</sup>

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treasurer of the state of New Jersey, "to have and to hold the same unto the said party of the second part, his successors in office and assigns, for their own use and benefit, as a guarantee to the parties who may be insured in the Anchor Life Insurance Company." The complainant filed the bill as a successor in office of Mr. Levy and as the treasurer of the State of New Jersey. The defenses set up that the Anchor Life Insurance Company was a private corporation of the State of New Jersey, and as to the right to alienate property was governed entirely by the statute law of its domicile, and had no power to act beyond the territorial limits of that state, and for that reason the assignment executed in the State of New York was invalid; also that there was no statute in the State of New Jersey authorizing the treasurer of that state to take and hold property for the purposes indicated in the

assignment. The court say: "The defendants are not in a position to question whether there is a statute in New Jersey authorizing the security of policy holders in insurance companies in the manner provided in this assignment. Those interested in the distribution of the money are the sole persons who can raise that question. The bond, mortgage and assignments, showing a complete title in the treasurer are produced. The defendants have not paid. There is no party who can require payment of them again. They are honestly and equitably bound to pay, and no claim is made in their behalf that their rights are or will be endangered by payment to the complainant."

<sup>1</sup> *Cheney v. Patton*, 134 Ill. 422; s. c. 25 N. E. Rep. 792.

<sup>2</sup> *Detroit Savings Bank v. Galvin*, 99 Mich. 55; s. c. 57 N. W. Rep. 1083.



## CHAPTER XVII.

### ANSWERS AND DEFENSES.

#### FRAUD, MISREPRESENTATION, MISTAKE AND DURESS.

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| <p>§ 356. Defense of fraud—Generally.</p> <p>357. Defense of fraud by mortgagor.</p> <p>359. Remedies of mortgagor against fraud.</p> <p>361. False representations as a defense.</p> <p>366. Mutual mistake of parties as a defense.</p> | <p>§ 368. Remedies for correcting a mistake.</p> <p>369. Mutual mistake as to title.</p> <p>372. Duress as a defense.</p> <p>374. Mortgage executed by married woman under duress—Coverture as a defense.</p> |
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§ 356. **Defense of fraud—Generally.**—The general rule that fraud vitiates whatever it touches is limited, when applied to mortgages, to the fraud of the mortgagee or his agents, committed upon the mortgagor. Thus it has been said that the assignment of a mortgage and judgment, the lien of which is sought to be foreclosed, is in fraud of the mortgagee, who had assigned the mortgage to the plaintiff's assignor for collection only, is not a defense in favor of defendants who do not claim under the mortgagee.<sup>1</sup> The defense of a married woman in foreclosure, that she was ignorant of the contents of the mortgage, and was induced to sign the same by the fraud and misrepresentation of her husband, is inadequate unless she also proves that the plaintiff mortgagee participated in or had knowledge of the fraud.<sup>2</sup> And improper means used by a husband to procure from his wife a deed of gift of land to him, or a ratification thereof, will not impair the security of one who, with the wife's knowledge, has loaned money to him upon such land without notice of the use of such means.<sup>3</sup>

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<sup>1</sup> Byers v. Brannon (Tex.), 19 S.W. Rep. 1091.

<sup>2</sup> Riggan v. Sledge (N. C.), 20 S. E. Rep. 1060.

<sup>3</sup> Hadden v. Larned, 87 Ga. 634; s. c. 13 S. E. Rep. 806.



It has been held that the misapplication of the earnings of a railroad company so as to bring about a default in interest upon its mortgage bonds is not available as a defense to the foreclosure of the mortgage, to the company or its stockholders, where it has the right to apply all the net earnings to the improvement of the road, and its action is approved by the stockholders at their annual meeting, as the loss falls upon the bondholders, and not upon the company or stockholders thereof.<sup>1</sup>

§ 357. **Défense of fraud by mortgagor.**—In those cases where a person has purchased property with knowledge of a mortgage upon it, he cannot defend against such mortgage on the ground that it was given to defraud the creditors of the mortgagor.<sup>2</sup>

§ 359. **Remedies of mortgagor against fraud.**—The supreme judicial court of Maine, in the case of *Ludd v. Putnam*,<sup>3</sup> say that in a suit upon a mortgage for foreclosure, the defendant may show fraud on the part of the mortgagee affecting the consideration.<sup>4</sup>

§ 361. **False representations as a defense.**—It has been held that representations by a land company's general manager, at the time of selling lots, that certain improvements, such as the grading of a drive to a proper level and the construction of a public park and hotel near the lots, would be made, do not constitute a valid defense to an action to foreclose a mortgage given for the purchase price of the lots, where such improvements were contemplated at the time and the representations were believed by the manager to be true, although the improvements were not in fact ever made.<sup>5</sup>

<sup>1</sup> *Farmers' Loan & T. Co. v. New York & N. R. Co.*, 78 Hun (N. Y.) 213; s. c. 28 N. Y. Supp. 933; 60 N. Y. S. R. 217.

<sup>2</sup> *Stevens v. McMillin*, 37 Minn. 509; s. c. 35 N. W. Rep. 372.

<sup>3</sup> 79 Me. 568; s. c. 12 Atl. Rep. 628; 5 N. Eng. Rep. 700.

<sup>4</sup> **As to setting aside sale under power for fraud.** See: *Post*, §§ 799, 800.

<sup>5</sup> *Joseph v. Decatur Land, I. & F. Co.*, 102 Ala. 346; s. c. 14 So. Rep. 739.

§ 366. **Mutual mistake of parties as a defense.**—The general rule is that courts of equity will relieve against a mistake, the same as against fraud, and will correct or reform the mortgage or trust deed so as to make it express the intention of the parties. Thus, it has been held by the supreme court of Illinois that the court, having obtained jurisdiction of a suit by an administrator to foreclose a mortgage, has power to reform it so as to express the intent of the parties.<sup>1</sup>

§ 368. **Remedies for correcting a mistake.**—The supreme court of Florida, in the case of *Greeley v. De Cottes*,<sup>2</sup> say that where there is a misdescription in a mortgage, of certain courses and distances, and on foreclosure this is perpetuated in the deed which is given to the mortgagees, who purchase the property, and also in various subsequent conveyances, a court of equity has power to correct the misdescription in the various instruments, to make them conform to the true intent of the parties to the mortgage, or to give equivalent relief by injunction.

§ 369. **Mutual mistake as to title.**—We have already seen<sup>3</sup> that where there is a mutual mistake the court will reform the instrument so as to make it express the intention of the parties. On the same principle it is held that a vendor who, to secure the purchase price of land, takes a mortgage upon other property under a mistaken legal conclusion of both parties that she held the fee in the property conveyed, when, in reality, her only interest was the possibility of dower, should she survive the life tenant, may recover the value of such expectant dower as of the time the deed was executed, in a suit upon the mortgage.<sup>4</sup>

§ 372. **Duress as a defense.**—Equally with fraud duress is a defense to an action to foreclose a mortgage, for the very plain reason that duress in itself is fraudulent. But this defense is personal to the party. The supreme court

<sup>1</sup> *Citizens' Nat. Bank v. Dayton*,  
116 Ill. 257; s. c. 4 N. E. Rep. 492;  
<sup>2</sup> West. Rep. 393.

<sup>3</sup> 24 Fla. 475; s. c. 5 So. Rep. 239.

<sup>4</sup> See: *Ante*, § 366.

<sup>5</sup> *Wilson v. Ott*, 160 Pa. St. 433; s. c.  
28 Atl. Rep. 848; 34 W. N. C. 159.

of Indiana, in the case of *West v. Miller*,<sup>1</sup> say that duress, illegal consideration, and coverture of one of the mortgagors are personal defenses, and are not available on foreclosure in favor of purchasers of equity of redemption.

§ 374a. **Mortgage executed by married woman under duress—Coverture as a defense.**—According to the doctrines of the common law, a married woman is supposed to act under the direction and special control of her husband; consequently, in the execution of a mortgage she, by the common law, is supposed to act under greater or less duress. The supreme court of Indiana, in the case of *Jouchert v. Johnson*, say that where it does not appear from the face of the complaint in foreclosure that the contract was executed by a *feme covert*, the defense of coverture must be affirmatively set up in the answer; and the burden is then upon the plaintiff to reply such facts as rendered her liable notwithstanding the coverture.

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<sup>1</sup> 125 Ind. 70; s. c. 25 N. E. Rep. 143.

<sup>2</sup> 108 Ind. 436; s. c. 9 N. E. Rep. 413; 6 West. Rep. 880.

## CHAPTER XVIII.

### ANSWERS AND DEFENSES—COUNTER-CLAIMS AND ESTOPPELS.

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|---------------------------------------------------|----------------------------------------------------------------------------------------|
| § 376. Allegation of counter-claim<br>or set-off. | § 394. Estoppel by silence at sale.                                                    |
| 387. Estoppel in pais against the<br>mortgagor.   | 395. Estoppel against purchaser of<br>mortgaged premises sub-<br>ject to the mortgage. |
| 390. Estoppel against married<br>women.           |                                                                                        |

§ 376. Allegation of counter-claim or set-off.—The general rule is that in an action to foreclose a mortgage in a court of equity, the mortgagor is entitled to set-off a debt due to him from the complainant in any case where a set-off would be allowed in an action at law. Yet it has been held that the owner of an undivided half-interest in land, who pays a designated sum to the owner of the other half to induce him to execute a quit claim deed of his half to one holding a mortgage on the entire land, is not entitled to have such amount allowed on his note to the mortgagee, where the latter was never consulted as to whether he would allow such payment on the note.<sup>1</sup> But it is said that mortgagors to whom the beneficiary in the mortgage assigns his interest as indemnity for the mortgagors becoming sureties on an attachment bond upon which they are subsequently compelled to pay the judgment, are entitled to set-off amount so paid as subsequent assignees of the mortgage.<sup>2</sup>

§ 387. Estoppel in pais against mortgagor.—It is well settled that in an action to foreclose a mortgage the mortgagor is estopped by his deed from denying the validity of his title to the mortgaged premises. And it is said, in the case of *Mills County National Bank v. Perry*,<sup>3</sup> that a

<sup>1</sup> *Mann v. Mann*, 49 Ill. App. 472.

<sup>3</sup> 72 Iowa 15; s. c. 33 N. W. Rep.

<sup>2</sup> *Fisher v. Bull* (N. J. Err. & App. 341.

1894), 29 Atl. Rep. 440.

(1228)

mortgagor is estopped to set up as a defense that the mortgage exceeds in amount the legal limit for a loan by a national bank seeking to foreclose.

§ 390. **Estoppel against married women.**—That a married woman is bound by estoppel the same as any other person, is well established. Under this rule the coverture of a married woman, who executed a mortgage to secure the bond of a third person, given to secure payment of a debt of her husband, is no defense to a suit to foreclose a mortgage.<sup>1</sup> Neither will coverture be a valid defense in an action to foreclose a mortgage given for the purchase price of the lands mortgaged, where the bill seeks no personal decree against the *feme* defendant, but simply asks a foreclosure of the mortgage and a sale of the premises to pay the debt secured thereby.<sup>2</sup>

§ 394. **Estoppel by silence at sale.**—It is the general rule that where a person who owns, or has an interest in, mortgaged property stands by and permits it to be sold without giving notice of his title, or asserting his rights, will be estopped from setting up his title or claim against the purchaser. Thus it has been said that the holder of a prior mortgage, made a party to proceedings to foreclose a subsequent mortgage, for whom an appearance is entered, without his knowledge, by an attorney of whom he has never heard, notice being first given to him, by telegraph, on the day of the sale, whereupon he attends the sale without making objection thereto, is concluded by the judgment in foreclosure, and cannot thereafter set up his prior mortgage against the purchaser at such sale.<sup>3</sup>

§ 395. **Estoppel against purchaser of mortgaged premises subject to the mortgage.**—It has been held, upon sound principles, that a purchaser of property subject

<sup>1</sup> Fowler v. Wood, 78 Hun (N. Y.) 304; s. c. 60 N. Y. S. R. 176; 28 N. Y. Supp. 976. But this decision was by a divided court.

Co., 102 Ala. 346; s. c. 14 So. Rep. 739.

<sup>3</sup> Baldwin v. Howell, 45 N. J. Eq. 519; s. c. 15 Atl. Rep. 236; 13 Cent. Rep. 362.

<sup>2</sup> Joseph v. Decatur Land, I. & F.

to a mortgage securing a promissory note is not entitled to have the lien of the mortgage limited to the amount due at maturity, by reason of the fact that the description of the note in the record of the mortgage, which was his only source of information, did not state the place of payment, and that he was unable to find the holder to pay him at maturity, as in such circumstances he should have made a tender at the place of business or residence of the maker under a statute<sup>1</sup> providing that a negotiable instrument not specifying a place of payment is payable at the place of residence or business of the maker.<sup>2</sup>

We have already seen<sup>3</sup> that a junior incumbrancer can not compel a senior mortgagor to foreclose his mortgage, or in any manner cut off, defeat or restrict his lien. And a junior mortgagee whose mortgage is expressly made subject to a prior mortgage, cannot defeat the lien of such prior mortgage in an action for its foreclosure, by showing that it is invalid as against the mortgagor.<sup>4</sup>

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<sup>1</sup> Utah Comp. Laws, 1888, § 2851.

<sup>2</sup> See: *Ante*, § 271.

<sup>3</sup> *McCauley v. Leavitt*, 10 Utah 91; s. c. 37 Pac. Rep. 164.

<sup>4</sup> *Park v. Prendergast*, 4 Tex. Civ. App. 566; s. c. 23 S. W. Rep. 535.



## CHAPTER XIX.

### ANSWERS AND DEFENSES.

RIGHT OF ACTION NOT ACCRUED—MORTGAGE DEBT NOT DUE—PAYMENT  
AND DISCHARGE—DENIAL OF PERSONAL LIABILITY—RELEASE OF  
PART OF MORTGAGED PREMISES.

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| § 402. Extension of time of payment<br>as a defense.                            | § 413. Alleging discharge and satis-<br>faction of mortgage in de-<br>fense. |
| 404. Payment as a defense.                                                      |                                                                              |
| 406. Attorney fees and taxes to be<br>paid as a part of the mort-<br>gage debt. | 414. Allegation of release of part<br>of mortgaged premises.                 |

§ 402. Extension of time of payment as a defense.—In the absence of special provisions in the mortgage to that effect, it cannot be foreclosed until the debt it was given to secure has become due and payable, or there has been a breach of some other covenant, even though the security may be impaired and rendered precarious;<sup>1</sup> and the same is true where the original time of payment has, for a valuable consideration, been extended to a later date than that originally fixed. But extension of time of payment, where interposed as a defense to a suit to foreclose a mortgage, must be specially pleaded and clearly made out by the evidence.<sup>2</sup>

§ 404. Payment as a defense.—Whenever a debt secured by mortgage is paid, or discharged, or released, the mortgage ceases to be a lien and can no longer have any legal effect; and where the debt has been paid in part, the payment made may be set up and to that extent will be a defense to the mortgage. Thus it has been held by the Alabama supreme court a plea that the mortgage of an undivided interest in land, under the foreclosure of which plaintiff in partition claims title, had been paid before the

<sup>1</sup> See: *Ante*, § 256, *et seq.*

<sup>2</sup> *Eastwood v. Worrell* (N. J. 1887),  
7 Cent. Rep. 363.

foreclosure cannot be interposed by a co-tenant who does not claim under the mortgagor, the decree in foreclosure being conclusive as to him.<sup>1</sup> And in a case in Georgia, where a mortgage was given to secure a debt in Confederate money, and large payments had been made upon it, nearly or quite sufficient to have extinguished the debt, and foreclosure proceedings were instituted for the principal and interest in full in the present currency, such payment in Confederate money was held to be a sufficient defense to such foreclosure.<sup>2</sup>

The supreme judicial court of Massachusetts, in the case of *Aldrich v. Aldrich*,<sup>3</sup> say that under the statutes of that state,<sup>4</sup> if a supplemental answer does not with sufficient certainty allege that plaintiff had received rents and profits of the mortgaged property, of which he had taken possession in foreclosure, which ought to be applied toward the payment of the principal and interest on the mortgage debt, the court may permit the answer to be amended; and a pending objection to the admissibility of evidence in proof thereof will become immaterial.

§ 406. **Attorney fees and taxes to be paid as part of the mortgage debt.**—The mortgage is a security for taxes properly paid by the mortgagee to protect his mortgage security,<sup>5</sup> and an enquiry into the validity of a tax title is proper in an action to foreclose a prior mortgage on the land where the land was conveyed by the purchaser of the tax title "subject to all liens and incumbrances now existing" thereon.<sup>6</sup>

§ 413. **Alleging discharge and satisfaction of mortgage in defense.**—Satisfaction and discharge of a mortgage is of course a good defense to a suit for its enforcement. But where a purchaser of land on which there is a

<sup>1</sup> *Sibley v. Alba*, 95 Ala. 191; s. c. 10 So. Rep. 831.

<sup>2</sup> *Meeks v. Johnson*, 75 Ga. 629.

<sup>3</sup> 143 Mass. 45; s. c. 8 N. E. Rep. 870; 3 N. Eng. Rep. 181.

<sup>4</sup> Mass. Pub. Stat., c. 167, § 42.

<sup>5</sup> *Harrigan v. Wellmuth*, 77 Mo. 542.

<sup>6</sup> *Oliphant v. Burns*, 146 N. Y. 218; s. c. 40 N. E. Rep. 980; 66 N. Y. S. R. 594.

trust deed gives a bond to the holder of the trust deed for a different amount, which the holder accepts on the condition that it is to be, when paid, a discharge of the debt secured by the trust deed, the holder making no guaranty of title and no misrepresentations about it, such acceptance of the bond does not discharge the trust deed; and the holder of the trust deed is not liable to the purchaser for expense in relieving the land of incumbrances discovered after the conveyance.<sup>1</sup>

§ 414. **Allegation of release of part of mortgaged premises.**—A release of the whole or a part of the premises mortgaged may be set up in answer to an action to foreclose the mortgage.<sup>2</sup> Hence in the foreclosure of a mortgage, where the defendant sets up a written conditional release with condition performed, and the plaintiff claims that such release is a forgery, the action will be dismissed where the court is satisfied, from all the evidence, that the release is genuine.<sup>3</sup> And a mortgagee who, having notice of successive alienations of portions of the mortgaged premises, releases a part then liable for the payment of the debt, cannot, without first deducting the value of the portions released, charge the other portion of the premises.<sup>4</sup>

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<sup>1</sup> Stimpson v. Bishop, 82 Va. 190.

<sup>2</sup> See: *Ante*, § 404.

<sup>3</sup> Latourette v. Gardner, 75 Mich.

134; s. c. 42 N. W. Rep. 610.

<sup>4</sup> Boone v. Clark, 129 Ill. 466; s. c. 21 N. E. Rep. 850.

## CHAPTER XX.

### ANSWERS AND DEFENSES.

ADVERSE AND PARAMOUNT CLAIMS OF TITLE—DEFECTIVE TITLE—FIXTURES—  
EVICTION—OUTSTANDING TITLE—WANT OF TITLE.

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| <p>§ 418. Adverse and paramount claims of title cannot be litigated in a foreclosure.</p> <p>420. Claim of paramount title can not be pleaded in answer.</p> | <p>§ 425. What claims as to priority may be set up in answer.</p> <p>431. Allegation of outstanding title or incumbrance.</p> <p>433. Payment of an outstanding claim by a purchaser as a defense.</p> |
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§ 418. Adverse and paramount claims of title cannot be litigated in a foreclosure.—The object of a mortgage foreclosure being merely to bar the mortgagor and all parties claiming under liens subsequent to the mortgage, it follows that questions of paramount and adverse title can not be considered and settled in such an action.<sup>1</sup> Thus it has been said that in an action for the foreclosure of a mortgage, the rights of the parties who claim in priority or in hostility to the mortgage cannot be litigated; and the decree does not affect rights paramount to those of the mortgagor and mortgagee.<sup>2</sup> Hence adverse title to mort-

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<sup>1</sup> See: *Ord v. Bartlett*, 83 Cal. 428; s. c. 23 Pac. Rep. 705; *Ludlow v. Ludlow*, 109 Ind. 199; s. c. 9 N. E. Rep. 769; 7 West. Rep. 378; *McEwen v. Beard* (Minn.), 59 N. W. Rep. 942; *Lebanon Savings Bank v. Waltermann*, 65 N. H. 88; s. c. 19 Atl. Rep. 1000; *Van Denburgh v. New York City C. U. R. Co.*, 25 Jones & S. (25 N. Y. Supr. Ct.) 285; s. c. 7 N. Y. Supp. 675; 28 N. Y. S. R. 578; *California Safe-Deposit Co. v. Cheney Electric-Light T. & P. Co.*, 12 Wash. 138; s. c. 40 Pac. Rep. 732; (1234)

*Farmers' Loan & T. Co. v. San Diego Street Car Co.*, 40 Fed. Rep. 105.

A claim of prior and paramount adverse title cannot be litigated in an action for the foreclosure of a mortgage; and 2 Hill's Wash. Code, §§ 143, 150, do not authorize such a litigation. *California Safe-Deposit & T. Co. v. Cheney Electric-Light T. & P. Co.*, 12 Wash. 138; s. c. 40 Pac. Rep. 732.

<sup>2</sup> *Van Denburgh v. New York City C. U. R. Co.*, 25 Jones & S. N. Y. (57 Super. Ct.) 285; s. c. 28 N. Y. S. R. 578, 7 N. Y. Supp. 675.

gaged premises held by a party claiming by conveyance from the mortgagor prior to the mortgage, is not the proper subject of determination in a foreclosure suit, but the proper course is to dismiss the action as to the adverse claimant, or to specify in the decree that it is made without prejudice to his adverse rights.<sup>1</sup>

On this principle the rights of creditors of a deceased person cannot be tried on a bill to foreclose a mortgage on decedent's lands given by the heirs;<sup>2</sup> neither can the title of a third party who intervenes and claims adversely to both the complainant and the defendant.<sup>3</sup> And a purchaser from a mortgagor stands in the same position as his grantor, and cannot defeat the mortgage by acquiring a tax title.<sup>4</sup> But it is said in *Ludlow v. Ludlow*,<sup>5</sup> that in an action to foreclose a mortgage a cross-complaint alleging in each paragraph that the cross-complainant is the owner of the property under a tax sale which antedated appellant's mortgage thereon, and that plaintiff and his co-defendants each claimed an interest in such property adverse to his title, is sufficient upon demurrer, under the Indiana statute.<sup>6</sup>

§ 420. Claim of paramount title cannot be pleaded in answer.—The fact that the only questions of title that can be considered on foreclosure are such as affect the equity of redemption, it follows that a mortgagee's right to foreclose his mortgage against any one going into possession subsequent to its execution is not affected by a tax sale for taxes or assessments which are not shown to have been liens on the lands when his mortgage was executed, unless notice thereof and opportunity to redeem was given him or the mortgagor.<sup>7</sup> And it has been said that where the holder of a tax certificate on lands who is made a party

<sup>1</sup> *Ord. v. Bartlett*, 83 Cal. 705 ; s. c. 23 Pac. Rep. 705 ; 23 Pac. Rep. 705 ; 83 Cal. 428.

<sup>2</sup> *Lebanon Sav. Bank v. Waterman*, 65 N. H. 88 ; s. c. 19 Atl. Rep. 1000.

<sup>3</sup> *Farmers' Loan & T. Co. v. San Diego Street Car Co.*, 46 Fed. Rep. 105.

<sup>4</sup> *McEwen v. Beard*, 58 Minn. 176 ; s. c. 59 N. W. Rep. 942.

<sup>5</sup> 109 Ind. 199 ; 9 N. E. Rep. 769 ; 7 West. Rep. 373.

<sup>6</sup> Ind. Rev. Stat. 1881, § 1070.

<sup>7</sup> *Ruyter v. Reid*, 121 N. Y. 25 N. E. Rep. 377 ; 24 N. E. Rep. 795 ; 33 N. Y. S. R. 590.

to a suit to foreclose a mortgage thereon, permits judgment to go by default, his assignee of the certificate, who subsequently receives a tax deed, cannot escape the effect of the judgment by having previously served a notice to redeem on the mortgagor.<sup>1</sup>

§ 425. What claims as to priority may be set up in answer.—The only questions a court may entertain in an action to foreclose a mortgage are such as are necessary to be determined in order that complete justice may be done the parties whose rights in the equity of redemption are to be barred by the decree of foreclosure. Hence, a corporation which became the owner of the corporation plant under a foreclosure decree and sale made expressly subject to complainant's claim for moneys paid on the mortgage cannot urge any equitable defense against his right to a decree for the amount of such judgments against the mortgaged premises, save that they were made with the funds of the corporation.<sup>2</sup>

§ 431. Allegation of outstanding title or incumbrance.—In an action to foreclose a mortgage a defense of an outstanding title or incumbrance cannot be interposed, for the reason that the incumbrance, if let alone, may never be asserted against the property. Thus, it has been held that a defense to a purchase-money mortgage, that there was at the time of the conveyance to the mortgagor an outstanding title, is not available, if at all, in the absence of evidence that the mortgagee conveyed neither a marketable title nor the possession.<sup>3</sup> And a mortgagor in undisturbed possession under a warranty deed from the mortgagee containing a covenant against all incumbrances cannot set up an outstanding incumbrance or title as a defense to a bill to foreclose the purchase-money mortgage, in the absence of an allegation of an eviction, actual or constructive, or of fraud or insolvency on the part of the mortgagee.<sup>4</sup>

<sup>1</sup> Clark v. Lock, 31 N. Y. S. R. 37; s. c. 9 N. Y. Supp. 918.

<sup>3</sup> Pharis v. Surrentt, 54 Mo. App. 9.

<sup>4</sup> Adams v. Fry, 329 Fla. 318; s. c.

<sup>2</sup> Bush v. Wadsworth, 60 Mich. 255; 10 So. Rep. 559.  
s. c. 27 N. W. Rep. 532.



§ 433. Payment of an outstanding claim by a purchaser as a defense.—A defendant who, to protect his title or interest, has paid and caused an incumbrance to be discharged, is entitled to set it up as a defense *pro tanto*, on his showing that what he paid was actually due, or that he gave notice of the incumbrance and required it to be discharged within a reasonable time. On this same principle, it has been held that where the pledgee of a mortgage has accepted an order conditioned for payment after the payment of his debt, and for the protection of his debt he is obliged to purchase the equity of redemption, he may retain the expenses thereof before paying such order.<sup>1</sup>

<sup>1</sup> Fiske v. Joy, 141 Mass. 311; s. c. 5 N. E. Rep. 514; 2 N. Eng. Rep. 61. In this case A agreed with B to sell the latter a tract of land in C; B agreeing to build ten houses upon it, A to advance \$500 on each house as the work progressed. B was to give ten mortgages, of \$3,800 each, one on each house; and when the houses were finished, A was to sell the mortgages, take out what was due him for land and for advances, insurance and other expenses, and pay the balance to B. D did certain work upon the houses, and A by his agent E, signed an acceptance of an order in which he agreed to reserve the amounts due D "from the mortgages of \$3,800, herein referred to, and from the amount left after deducting the payments due A for land and advances; said amounts to be paid when mortgages are permanently placed." The order and acceptance were made with an implied reference to the contract between A and B,

the terms and purposes of which were known to the plaintiff. A assigned two of the mortgages for their full value, and transferred seven of them as collateral security, on which he received \$2,000 each. The other mortgage was held by him. B failed to perform his contract, and A was obliged to expend a large sum to complete it. B conveyed to A eight of the lots, being the lots not covered by the two mortgages assigned, for their full value, as above stated, by a warranty deed, reciting that the premises were conveyed subject to eight mortgages, of \$3,800 each, which the grantee was to assume and pay. The fair market value of the land and buildings conveyed, free from all incumbrances, was \$17,600, and there were unpaid taxes upon the same. The court held that the mortgages had not been "placed" and that the plaintiff could not maintain an action on the acceptance by A.

## CHAPTER XXI.

### PRACTICE ON FAILURE TO ANSWER—DEFAULT—PRACTICE ON TRIAL AFTER ISSUE JOINED.

REFERENCE TO COMPUTE AMOUNT DUE—POWERS AND DUTIES OF REFEREE—  
REPORT OF REFEREE—DECREE OF FORECLOSURE AND SALE—  
PROCEEDINGS ON TRIAL.

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| <p>§ 438. Introductory.</p> <p>444. Contents of order—Whole amount due, and not due.</p> <p>445. Contents of order—Where infant and absentee defendants.</p> <p>459. Filing and confirming referee's report—Exceptions thereto—New hearing.</p> | <p>§ 460. Application for judgment—What must be shown.</p> <p>462. Decree of foreclosure and sale.</p> <p>462a. Same—Personal judgment.</p> <p>465. Proceedings on trial after issue joined — General rules.</p> |
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§ 438. Introductory.—Where a defendant in a mortgage foreclosure sale fails to answer within the time allowed by law for that purpose, the plaintiff may have a decree of foreclosure and order of reference to compute the amount due. Where there are two or more defendants upon default of one defendant in a mortgage foreclosure, a decree may properly be entered against him without waiting for the determination of the issues joined by another defendant, and upon such determination a second decree may be entered against the latter.<sup>1</sup>

§ 444. Contents of Order—Whole amount due, and not due.—The United States circuit court of appeals, for the Seventh circuit, in the case of *Grape Creek Coal Company v. Farmers' Loan and Trust Company*,<sup>2</sup> say that a decree for the foreclosure of a mortgage should find the amount unpaid upon the principal, and decree its payment

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<sup>1</sup> *Small v. Wicks*, 82 Iowa 734; s.c.  
47 N. W. Rep. 1031.  
(1238)

<sup>2</sup> 12 C. C. A. 350; s. c. 63 Fed. Rep.  
891.

out of the proceeds of the sale, whether the principal is due or not.

§ 445. Contents of order—When infant and absentee defendants.—It is said that in a foreclosure proceedings in which there are infant defendants having an interest in the land, a reference should be ordered to ascertain whether their rights require a sale in parcels; but where all the parties are adults, a reference is unnecessary, unless such a sale in parcels is demanded.<sup>1</sup>

§ 459. Filing and confirming referee's report—Exceptions thereto—New hearing.—The supreme court of Arkansas, in the case of *Johnson v. Meyer*,<sup>2</sup> say that it is not error to enter a decree in foreclosure without passing upon exceptions to a master's report, the question raised by the exceptions being involved in the final determination and therefore determined by the decree.

§ 460. Application for judgment—What must be shown.—The supreme court of Michigan, in a recent case, hold that under the statute of that state<sup>3</sup> it is only where a personal decree is sought against sureties, or other persons besides the mortgagor, that such decree must be based on some written obligation, and there is no such condition as to the mortgagor himself.<sup>4</sup>

§ 462. Decree of foreclosure and sale.—It is thought that in an action to foreclose a mortgage, a decree for plaintiff should not be delayed to await a settlement of issues raised between co-defendants.<sup>5</sup> And it is said that although in a decree of foreclosure the defendant's first name is incorrectly stated in the recital as to his making default, as well as in the petition, yet where he accepted service in his proper name, and the decree contains a correct recital of that fact, the notice is sufficient.<sup>6</sup>

<sup>1</sup> *Homer v. Schonfeld*, 84 Ala. 313;  
s. c. 4 So. Rep. 105.

<sup>2</sup> 54 Ark. 442; 16 S. W. Rep. 123.

<sup>3</sup> How. Mich. Stat. § 6704.

<sup>4</sup> *Shelden v. Warner*, 59 Mich. 444;  
s. c. 26 N. W. Rep. 667.

<sup>5</sup> *Heath v. Blake*, 23 S. C. 406; s. c.  
5 S. E. Rep. 842; *Canaday v. Boliver*,  
25 S. C. 547.

<sup>6</sup> *Lindsay v. Delano*, 78 Iowa 350;  
s. c. 43 N. W. Rep. 218.

§ 462a. **Same—Personal judgment.**—The supreme court of California, in the case of *Talman v. Smith*,<sup>1</sup> say that a foreclosure decree that a certain sum is due plaintiff, and that the property be sold and the proceeds applied to the payment thereof and of costs and expenses, there being no provision for docketing a judgment for any deficiency, is not a personal judgment.

§ 465. **Proceedings on trial after issue joined—General rules.**—The trial of an action to foreclose a mortgage is conducted substantially the same as other actions tried by a court or a referee. Thus ordinarily the burden of proof is on the plaintiff,<sup>2</sup> and a verified petition is not sufficient proof on which to found a decree;<sup>3</sup> but the plaintiff need not prove title in the mortgagor where that point is not controverted by the defendant,<sup>4</sup> and if the defendant asserts title in such case, he must prove it.<sup>5</sup> And in those cases where the plaintiff alleges that a defendant claims to have a lien upon the premises, but that the same is inferior to the mortgage, and the defendant answers, admitting the mortgage, and setting up his lien, and alleging that it is superior to the mortgage, the defendant has the burden of proof to establish the superiority of his lien.<sup>6</sup> Defendants in a mortgage foreclosure claiming under an attachment lien accruing after the mortgage was given, are entitled to prove the existence of their lien, and to show that, in consequence of certain acts of the plaintiff set forth in their answer, it is superior to the lien of the mortgage.<sup>7</sup>

In those cases, however, where the note to secure which the mortgage was given is recited in the complaint, and the averment as to its contents and due execution is not denied by the answer, the plaintiff need not offer evidence to prove the indebtedness.<sup>8</sup> And in those cases where the

<sup>1</sup> 85 Cal. 280; s. c. 24 Pac. Rep. 743.

<sup>2</sup> *Daniels v. Hester*, 24 S. C. 301.

<sup>3</sup> *Chancellor v. Traphagen*, 41 N. J. Eq. 369; s. c. 3 Atl. Rep. 263; 7 *Id.* 505; 2 Cent. Rep. 209.

<sup>4</sup> *Daniel v. Hester*, 24 S. C. 301.

<sup>5</sup> *Id.*

<sup>6</sup> *Vaughn v. Eckler*, 69 Iowa 332; s. c. 28 N. W. Rep. 624.

<sup>7</sup> *Scrivener v. Deitz*, 68 Cal. 1; s. c. 8 Pac. Rep. 609.

<sup>8</sup> *Cerf v. Ashley*, 68 Cal. 419; s. c. 9 Pac. Rep. 658.

execution of the notes and mortgage is denied the introduction of the notes and the duly acknowledged mortgage makes a *prima facie* case for the plaintiff upon the issues joined.<sup>1</sup> But it has been held that when there are two attesting witnesses to a mortgage or other conveyance, its execution must be proved by one or both of them, unless the case is brought within some recognized exception to the general rule; and the admission of the mortgagor or grantor himself, not made *in judicio*, does not dispense with the necessity for this proof.<sup>2</sup>

It is thought that acts and declarations which transpired between plaintiff and defendant are admissible in evidence, although occurring in the presence of the person for whose debt the mortgage was given, who is since deceased, conversations with whom would be inadmissible by reason of his decease.<sup>3</sup> And it is held in Pennsylvania that in a *scire facias sur mortgage* executed as security for a debt of another than the mortgagor, evidence of the transaction creating the debt is admissible to determine the amount to be recovered, which cannot be more than the actual debt, whatever may be the nominal amount of the mortgage.<sup>4</sup>

In an action by an administrator upon promissory notes and to foreclose a mortgage given to his decedent, where the defendant introduced evidence that, in conversation with the witnesses, the decedent had told them that he had agreed with the defendant to give him the notes and mortgage for furnishing the decedent a home during his life, it was held not to be competent, in rebuttal, to prove declarations of the decedent, made shortly before his death, and subsequent to the time of the agreement testified to, that he was holding the mortgage against the defendant, and had fears that the defendant would cheat him out of it; that the defendant's wife did not sign the mortgage; and that he feared a prior mortgage would render him

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<sup>1</sup> Mixer v. Bennett, 70 Iowa, 329;  
s. c. 30 N. W. Rep. 587.

<sup>2</sup> Coleman v. State, 79 Ala. 49.

<sup>3</sup> Jackson v. Payne, 114 Pa. St. 67;  
s. c. 6 Atl. Rep. 340; 2 Cent. Rep. 150.

<sup>4</sup> *Id.*



unable to collect his debts out of the land mortgaged.<sup>1</sup> In those cases where it is sought to subject machinery or other property to the payment of the mortgage debt, evidence of a mortgagor that it was on the premises when the mortgage was made is competent to show that it was embraced in the mortgage.<sup>2</sup>

<sup>1</sup> Brown v. Kenyon, 108 Ind. 283; 9 N. E. Rep. 283; 6 West Rep. 553. In this case the court say: "The general rule is well settled that declarations by a decedent against his interest may be introduced in evidence against the administrator, and that declarations in his own favor, made in the absence of the other party, are incompetent in behalf of the administrator. Bristol v. Bristol, 82 Ind. 276. There is an exception to that rule, which is stated in the case of McConnell v. Hannah, 96 Ind. 102, as follows: 'But an exception thereto is that, when declarations qualifying and giving character to an act proper to be given in evidence, accompany that act, they are admissible, whether self serving or not, because they are a part of the *res gestae*.' In the case of Creighton v. Hoppis, 99 Ind. 369, this court quoted with approval the following from the opinion in the case

of Downs v. Lyman, 3 N. H. 486, viz.: 'The rule of law is that, where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence, for the purpose of showing its true character.'

"In order that such declarations accompanying an act, may be competent as a part of the *res gestae*, manifestly the act itself must be material to the issue involved. When there is a question of ownership, for example, it is competent to prove possession, because possession is *prima facie* evidence of ownership, and, because possession is thus material, declarations accompanying it are competent."

<sup>2</sup> Gill v. Weston (No. 2), 110 Pa. St. 312; s. c. 1 Atl. Rep. 917; 1 Cent. Rep. 370.



## CHAPTER XXII.

### SALE OF MORTGAGED PREMISES.

DECREE OF SALE—OFFICER MAKING SALE—NOTICE OF SALE—TIME OF SALE—  
PLACE OF SALE—TERMS OF SALE—STAY OF SALE.

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| <p>§ 469. Decree of sale — Generally.<br/>469a. Same—Where there are two or more debts.<br/>469b. Sale under trust deed.<br/>469c. Reduction of judgment in favor of creditor—Effect on mortgagor.<br/>470. Form and contents of decree of sale.<br/>470a. Same—Description of property.<br/>470b. Same—Amendment of description.<br/>470c. Time within which sale may be made.<br/>470d. Mortgagor remaining in possession after sale—Constitutionality of statute.<br/>471. By what officer sale to be made.<br/>471a. Same—Authority.<br/>473. Duties of officer making sale.<br/>473a. Same—Appraisement.<br/>473b. Same—Same—objections to.<br/>474. Discretion of officer.<br/>475. Notice of sale.<br/>475a. Same—Defects in.<br/>476. Contents of notice of sale.<br/>476a. Same—Describing improvements.<br/>476b. Same—On sale under power.<br/>477. Publication of notice of sale.</p> | <p>§ 477a. Same—Notice of adjourned sale.<br/>477b. Same — Mortgage with power of sale.<br/>477c. Same—Time of publication.<br/>477d. Same—Place of Publication — Religious paper with news column.<br/>477e. Same — Posting statutory notice.<br/>477f. Same—Service of notice.<br/>478. When sale to be made — Hour of day.<br/>479. Sale to be made at time advertised—Place of sale.<br/>479a. Same — At door of court house.<br/>480. Terms and conditions of sale.<br/>480a. Same—Where only part of debt due.<br/>480b. Same — Deductions from purchase price.<br/>480c. Same—Failure to complete purchase.<br/>482. Sale on credit—Unsatisfied prior liens.<br/>482. Whole property subject to sale.<br/>482b. Certificate of sale—Form of.<br/>483. Order staying sale.<br/>483a. Restraining sale.</p> |
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§ 469. Decree of sale—Generally.—A decree of foreclosure is as comprehensive in its effect upon the title of  
(1243)

the mortgagor as a decree in a suit to quiet title;<sup>1</sup> and after the time for redemption has expired, the mortgagee or holder of the mortgage, may proceed with all legal despatch, and is not required to give the defendant notice of the issuance of the order of sale.<sup>2</sup> It has been said that the assignee of the two decrees for the foreclosure of mortgages on the same land, rendered in favor of different persons, who sells the land under the junior lien without fraud or misrepresentation of any kind, is not estopped by such sale and the receiving of the money thereunder to sell the land again to satisfy the prior lien.<sup>3</sup>

In Pennsylvania a judgment and decree of foreclosure obtained after two returns of *nihil* under a writ of *scire facias sur mortgage* is good although the mortgagor was dead when the first writ issued; and a sale in pursuance of such judgment will pass the title.<sup>4</sup>

It has been held that a decree for the sale on foreclosure of a railroad of which a receiver has been appointed properly directs that the purchaser take the property subject to the outstanding expenses and obligations incurred by the receiver, requiring the receiver to file a statement thereof so that the amount may be named at the sale with sufficient certainty to enable an intending purchaser to bid with confidence in those cases where the road must be kept going by the receiver until delivered to the purchaser,<sup>5</sup> or the court may limit the charges subject to which the sale is made to such as are undisputed or adjudged valid by the Federal courts in which the foreclosure proceedings are conducted, and the purchaser will hold the property free from any claims arising against the receivers, not embraced in the terms of the reservation made in the decree ordering the delivery of the property to such purchaser.<sup>6</sup>

<sup>1</sup> Gaylord v. La Fayette, 115 Ind. 423; s. c. 17 N. E. Rep. 899; 15 West Rep. 479.

<sup>2</sup> Smith v. Foxworthy, 39 Neb. 214; s. c. 57 N. W. Rep. 994.

<sup>3</sup> Matless v. Sundin (Ia.), 62 N. W. Rep. 662

<sup>4</sup> Lehman v. Tammany (Pa. C. P.), Kulp 235.

<sup>5</sup> Bound v. South Carolina R. Co., 7 C. C. A. 322; s. c. 58 Fed. Rep. 473.

<sup>6</sup> Central Trust Co. v. St. Louis, A. & T. R. Co., 59 Fed. Rep. 385.

The sale of a railroad free

§ 469a. **Same**—Where there are two or more debts.—In those cases where suit is brought to foreclose both a mortgage upon certain real estate and a judgment lien, obtained under statute,<sup>1</sup> upon certain other real estate for the debt secured by the mortgage, no right exists to have the property held by the judgment lien charged only with the excess of the debt over the appraised value of the mortgaged property.<sup>2</sup> But it is said by the supreme court of Arkansas, in *Greer v. Turner*,<sup>3</sup> that where a debtor owes to the same creditor two distinct debts, one of which is secured by a mortgage of real estate, and the other by a mortgage upon a growing crop, the proceeds of the mortgaged crop that come to the creditor's hands must be applied to that debt which the crop mortgage was made to secure. No specific appropriation is required at the time such proceeds are received, in order to fix the rights of the parties. By the terms of the mortgage they have agreed in advance how the proceeds shall be disposed of; and neither party can, without the consent of the other, change the appropriation. It has been held that a mortgagor may purchase at a sale under his own mortgage; but that if he has given a subsequent mortgage upon the same property, his purchase will not defeat this, but will operate for the benefit of it, in the same way as a discharge or transfer of the same mortgage to himself would have done.<sup>4</sup>

from all liens is thought to be properly ordered, in a second mortgage foreclosure, where the holders of the first liens are pressing for a sale and entitled to it unless paid, and no one offers to make such payment, although certain bondholders under a subsequent mortgage ask the privilege of redeeming without making such offer, and ask the court to direct a sale subject to the incumbrances prior to the mortgage in suit and direct payment of the prior liens out of the proceeds, without offering to bid an amount to pay them or the costs and expenses of the sale, especially where the decree provides for redemption at

any time before sale by paying the amounts found due. *Bound v. South Carolina R. Co.*, 58 Fed. Rep. 473; s. c. 7 C. C. A. 322.

<sup>1</sup> As Conn. Acts 1878, c. 58.

<sup>2</sup> *Gushee v. Union Knife Co.*, 54 Conn. 101; s. c. 6 Atl. Rep. 192; 2 N. Eng. Rep. 755.

<sup>3</sup> 47 Ark. 17; s. c. 14 So. Rep. 383.

<sup>4</sup> *Plum v. Studebaker Bros. Mfg. Co.*, 89 Mo. 162; s. c. 1 S. W. Rep. 217; 4 West. Rep. 640; *Holliger v. Bates*, 43 Ohio St. 437; s. c. 2 N. E. Rep. 841; 1 West. Rep. 516. See: *Thompson v. Heywood*, 129 Mass. 401; *Otter v. Vaux*, 6 De G. M. & G. 638.

§ 469b. **Sale under trust deed.**—The general rule is that a sale under a trust deed should not be ordered before taking an account of liens on the land.<sup>1</sup> But in those cases where there is no cloud on the title, uncertainty as to the debts secured or the amounts thereof, or a dispute as to priorities, it is not the duty of the trustee, in every case where there are liens on the trust subject, to invoke the aid of equity before making the sale *in pais*.<sup>2</sup> But where a deed of trust is executed, and there are a number of prior judgment liens on the land for the enforcement of which resort to equity is necessary, the court will fix the terms of sale according to the rules of equity, without regard to the terms fixed in the trust deed.<sup>3</sup>

§ 469c. **Reduction of judgment in favor of creditor—Effect on mortgagor.**—In those cases where there has been a reduction of a judgment in foreclosure in favor of a creditor of the mortgagor entitled to redeem therefrom, in a suit brought by him for that purpose, but without making the mortgagor a party, leaves the original foreclosure judgment in full force as against the mortgagor, and entitles the mortgagee to a second foreclosure sale for the unsatisfied part of the foreclosure judgment as if it was a separate judgment against the mortgagor.<sup>4</sup>

§ 470. **Form and contents of decree of sale.**—It has been said that a decree in a suit to foreclose an ordinary mortgage for the nonpayment of notes long past due by their express terms, and of money advanced for taxes and insurance in accordance with the provisions of the mortgage, sufficiently finds that the money is due and its nonpayment is a breach of the condition of the deed of trust, by setting out the amounts due on the several accounts, with their maturity and the rate of interest each shall bear.<sup>5</sup>

<sup>1</sup> Alexander v. Howe, 85 Va. 198; s. c. 7 S. E. Rep. 248; Adkins v. Edwards, 83 Va. 300; s. c. 2 S. E. Rep. 435.

<sup>2</sup> Muller v. Stone, 84 Va. 834; s. c. 6 S. E. Rep. 223.

<sup>3</sup> Barbour v. Tompkins, 31 W. Va. 410; s. c. 7 S. E. Rep. 1.

<sup>4</sup> Ewing v. Bratton, 132 Ind. 345; s. c. 31 N. E. Rep. 562.

<sup>5</sup> Taylor v. Girard L. Ins. A. & T. Co., 1 App. Cas. D. C. 209; s. c. 21 Wash. L. Rep. 632.

But a judgment foreclosing a mortgage, declaring that the indebtedness secured shall be collectible without relief from valuation and appraisal laws, is erroneous in the absence of any stipulation in the notes or mortgage securing them providing that the debt should be collectible without relief from such laws.<sup>1</sup>

To render a decree of foreclosure valid the court must have jurisdiction in the premises; yet where the proceedings in a foreclosure action are otherwise regular, an omission of the decree and the notice of sale to set forth the county and state in which the land is situated, is not fatal in a subsequent action for the recovery of the land.<sup>2</sup>

The supreme court of New York, in the case of *Clapp v. McCabe*,<sup>3</sup> say that a decree for the sale of the mortgaged premises described in the complaint in an action to foreclose a mortgage, which complaint alleges that part of the premises has been released, referring to the release by date and place of record, and correctly describing the part remaining subject, does not cover the part released, although the subsequent description excepts from the entire tract the unreleased part.

It has been held that in foreclosing a purchase-money mortgage on premises upon which the purchaser has erected buildings for which he has not paid, the decree may properly order a sale of the premises first for the payment of such purchase money, and thereafter for the satisfaction of the liens of the parties interested.<sup>4</sup>

It is said in the case of *Sprague v. Blaner*,<sup>5</sup> that a judgment foreclosing a mortgage held by a surviving husband against his wife's land is erroneous where the premises are directed to be sold subject to dower and homestead in him, while the homestead was released by the mortgage and his rights subject thereto, and his interests are

<sup>1</sup> *Duckwall v. Kisner*, 136 Ind. 99; s. c. 35 N. E. Rep. 697.

<sup>2</sup> *Bryan v. Scholl*, 109 Ind. 307; s. c. 10 N. E. Rep. 107; 7 West. Rep. 560.

<sup>3</sup> 84 Hun (N. Y.), 379; s. c. 32 N. Y. Supp. 425.

<sup>4</sup> *Blatchford v. Blanchard*, 57 Ill. App. 518.

<sup>5</sup> 45 Ill. App. 17.



exempted from contribution, as by his estate in homestead and as surviving husband he is bound in equity to keep down the interest out of the rents and profits. Also that a judgment in foreclosure against heirs and administrator, finding the plaintiff entitled to recover a certain sum, and decreeing that the defendants pay the same and costs, and in default thereof the premises be sold, is alternative, and not personally against the defendants.

It has been said that a decree of foreclosure is not erroneous because not rendered against a subsequent purchaser of part of the lands subject to half of the mortgage, which he agreed to pay as part of the purchase price, where the mortgagee never accepted his obligation and seeks no personal judgment against him, and such purchaser has paid nearly all the purchase money.<sup>1</sup> And it is thought the fact that a decree of sale under a mortgage ordered the sale of both personal and real property, while there was no authority to order the sale of personal property, does not make the decree void as to the real property, where that alone is sold and no effort made to sell the personal property.<sup>2</sup>

The Illinois court of appeals has held that a decree in a foreclosure suit, requiring the defendants to pay to the plaintiff a designated sum, and that in default of such payment the mortgaged land, or so much as may be necessary to satisfy the decree, be sold and the amount paid out of the proceeds, is not a decree *in personam*.<sup>3</sup>

§ 470a. Same—Description of property.—The general rule is that the decree of foreclosure must contain an accurate description of the property directed to be sold. Thus it is said that an order for the delivery of possession of mortgaged property by the mortgagor to the mortgagee forming part of a judgment for foreclosure absolute ought to contain a description of the property as set forth in the mortgage deed, in order that the writ of possession may identify

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<sup>1</sup> Duckwall v. Kisner, 136 Ind. 99; 29; s. c. 16 Atl. Rep. 374; 19 Md. s. c. 35 N. E. Rep. 697. L. J. 899.

<sup>2</sup> Bernstein v. Hobelman, 70 Md. <sup>3</sup> Phelan v. Iona Sav. Bank, 48 Ill. App. 171.



the property.<sup>1</sup> Such a decree describing mortgaged property substantially in the terms of the mortgage is sufficient.<sup>2</sup> And it is thought a description in a decree on foreclosure of a legal sub-division in a United States government survey as "south ten acres" is sufficient between private persons, although the term "quarter" is ordinarily used by the government in patents of land.<sup>3</sup> But it is said that in the absence of any allegation of mistake, or prayer for reformation, a decree for the sale of 100 acres off the east side of the southeast quarter of a certain section of land, mortgaged as "the east side of the southeast quarter" is erroneous notwithstanding an allegation in the bill that the mortgage was intended to include 100 acres off the east side, and other parts of the mortgaged property are described as the "east half" of certain quarters of certain sections.<sup>4</sup> The supreme court of Colorado, in the case of *Thompson v. Brocker*,<sup>5</sup> say that an interlocutory decree in a suit to foreclose a mortgage, that "the mortgaged premises mentioned in the complainant's bill, viz.," followed by a description of the premises differing from that in the bill, sufficiently describes the property, where the bill contains an accurate description,—especially where it is evident that the difference in the description arises from the insertion of the preposition "of" in place of the conjunction "and," so as to make the description call for a portion only of one of the mortgaged parcels, instead of two separate parcels. And the supreme court of California declare that the description of land in the decree in a mortgage foreclosure is sufficient if it describes the same land as that described in the complaint, although it does not describe it in the same words.<sup>6</sup> And it is thought that a foreclosure sale is not invalidated by the fact that the land is misdescribed in the judgment in that the portion sold is designated as the "eastern," whereas it was in fact the "western" portion of a certain tract, where

<sup>1</sup> *Thynne v. Sarl* (1891), 2 Ch. 79.

<sup>4</sup> *Kemp v. Moir*, 45 Ill. App. 490.

<sup>2</sup> *Cook v. Shorthill*, 82 Iowa 277;  
s. c. 48 N. Y. Rep. 84.

<sup>5</sup> 18 Colo. 328; s. c. 32 Pac. Rep.  
831.

<sup>3</sup> *McCartney v. Dennison*, 101 Cal.  
252; s. c. 35 Pac. Rep. 766.

<sup>6</sup> *McCartney v. Dennison*, 101 Cal.  
252; s. c. 35 Pac. Rep. 766.

there is sufficient other description to identify the portion sold, and the purchaser already owned the eastern portion.<sup>1</sup> But a sale cannot be decreed as a whole of two tracts with defined boundaries mortgaged by different parties with separate interests without their consent, though the tracts lie within the boundaries of a larger tract.<sup>2</sup>

The Texas court of civil appeals, in the case of *Birdseye v. Rogers*,<sup>3</sup> say that a petition and judgment in proceedings to sell land under a mortgage are not void for uncertainty because of a single misrecital in the description of the land in the petition, where there is a reference in the petition for a more particular description of the lands to a grant in which the lands are properly described.

§ 470b. **Same—Amendment of description.**—In the supreme court of Kansas, in the case of *Keys v. Lardner*,<sup>4</sup> the description of the mortgaged premises in the decree of foreclosure was amended so as to include therein a tract not clearly included in the original description, was declared to be erroneous as against a defendant whose motion to require the plaintiff to make his petition more definite and certain by giving a sufficient description of the land on which the mortgage lien was claimed, and the defendant's answer to the effect that he was the owner of the tract and that it was not included in the description of the mortgaged land, was treated by the court as a disclaimer. But it is thought that the mere correction of a clerical error in a decree of foreclosure, and the insertion of a clause permitting judgment creditors to redeem, does not affect the decree so as to interrupt the running of the time fixed thereby for payment, and does not postpone the time in which notice of sale may be given.<sup>5</sup>

§ 470c. **Time within which sale may be made.**—In a

<sup>1</sup> *Vissman v. Bryant*, 21 S.W. Rep. 759; s. c. 14 Ky. L. Rep. 874.

<sup>2</sup> *Doty v. Berea College* (Ky. 1891), 15 S. W. Rep. 1063; s. c. 12 Ky. L. Rep. 964; rev'd in 16 S. W. Rep. 268; s. c. 12 Ky. L. Rep. 965.

<sup>3</sup> 26 S. W. Rep. 841.

<sup>4</sup> 55 Kan. 331; s. c. 40 Pac. Rep. 664.

<sup>5</sup> *Vail v. Arkell*, 146 Ill. 363; s. c. 34 N. E. Rep. 937.

recent case in the District of Columbia it was held that a decree foreclosing a mortgage expressly empowering the trustees to sell the property at public sale upon ten days' notice, is not erroneous in failing to fix a definite time in the future for the payment of the sums due, before which sales cannot be made, where the amount is long past due, and fifteen days' notice of the time and place of sale are required to be given, and the sale is required to be made for one-third cash and the remainder payable in two years.<sup>1</sup>

It has been held that the supreme court of Wisconsin, under a statute of that state, providing that no sale upon a judgment of foreclosure shall be made until the expiration of one year from the date of such judgment or order of sale, such year is to be computed from the time when the judgment is signed and filed and the costs are taxed, although it is not recorded or entered on the record until later, since the object of the statute is to secure to the party entitled to redeem an entire year in which so to do after the amount necessary to be paid has been ascertained and definitely declared by the judgment of the court.<sup>2</sup>

§ 470d. **Mortgagor remaining in possession after sale—Constitutionality of statute.**—Recently there has been developed in some of the states, and particularly in the Middle-West, a tendency to legislate in favor of the debtor class by granting them from twelve to eighteen months in which to redeem from a foreclosure sale, and permitting them, in the meantime, to occupy the mortgaged premises. Legislation of this kind received a serious check by the recent decision of the United States supreme court, in the case of *Barnitz v. Beverly*.<sup>3</sup> In that case, a statute changing the remedy of mortgage foreclosures by giving the mortgagor the right to continue in possession for eighteen months after the sale, and prohibiting any subsequent sale of the land under any deficiency judgment on

<sup>1</sup> *Taylor v. Girard L. Ins. A. & T. Co.*, 1 App. Cas. D. C. 209; s. c. 21 Wash. L. Rep. 632.

<sup>2</sup> *Meehan v. Blodgett*, 86 Wis. 511; s. c. 57 N. W. Rep. 291.

<sup>3</sup> 163 U. S. 118; 41 L. ed. —; s. c. 16 Sup. Ct. Rep. 1042.

such foreclosure, is held unconstitutional so far as it applies to mortgages made before the statute was passed. The question was raised under the Kansas statute, and was passed upon by the supreme court of that state.<sup>1</sup> In the course of the opinion of the state court, the law of the subject is reviewed by Chief Justice Martin. He reached the conclusion that the act affected the remedy only. But intimated doubt of his own position by adding: "Even doubt of the constitutionality of said chapter is not sufficient to warrant its judicial condemnation, especially by this court. In such case it seems better to leave such condemnation to the official arbiter, the supreme court of the Union." On appeal to the supreme court of the United States, the justices of that court were unanimous in holding the act unconstitutional as an attempt to impair the obligation of contracts.

It has been truly said that this conclusion is not only final as authority, but impregnable in reason. The reason for this is because the mortgage purports to give the land as security for payment of the debt. It authorizes the sale of the fee,—the entire property or interest of the mortgagor. The Kansas statute cuts down this security and allows the sale of a vested remainder only, of which enjoyment is postponed until the expiration of eighteen months after the sale. Unless purchasers will give as much for such a future estate as they will for unqualified ownership with present possession, the security is lessened by the statute. Then, if the sale of the lessened estate brings less than the debt, the statute further aims to provide an effectual barrier against any further attempt to obtain the full benefit of the security bargained for exempting the land after foreclosure from any further liability on account of any deficiency judgment for the mortgage debt. Disguised as a mere change of remedy, this amounts to a plain denial of the mortgagee's right to the security for which he contracted.<sup>2</sup>

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<sup>1</sup> See: *Beverly v. Barnitz*, 42 Pac.

<sup>2</sup> 3 Cas. & Com. 2.

Rep. 725; s. c. 31 L. R. A. 74.

§ 471. **By what officer sale to be made.**—The general rule is that a sale of mortgaged premises must be made by the sheriff of the county in which the mortgaged premises are situated or by some person designated by the court for that purpose. It has been said that an order appointing a commissioner to sell mortgaged property is not invalid because the prayer of the complaint was that it be sold by the sheriff;<sup>1</sup> also that an order appointing a commissioner to sell mortgaged property is not invalid because the decree on which it is founded ordered the property to be sold by the sheriff, as the decree may be amended by striking out the word "sheriff" and inserting "commissioner."<sup>2</sup> The supreme court of Dakota, in the case of *Hodgdon v. Davis*,<sup>3</sup> say that a sale on foreclosure, made by a deputy sheriff but not in the name of the sheriff, is not invalid, although perhaps irregular. But it seems that a trustee empowered to sell on non-payment of debt to secure which the trust is created has no power to appoint an agent to sell for him.<sup>4</sup> In those cases where a deed of trust names two trustees, giving them "power to act severally and each independent of the other;" and providing that "the proceeds of the sale . . . shall be paid to the trustees, or either of them;" and that "the receipt of the trustees, or either of them, shall be conclusive;" and containing nothing in the selling clause inconsistent therewith, one of the trustees may make a valid sale and conveyance of the property without joining the other trustee in the deed.<sup>5</sup>

§ 471a. **Same—Authority.**—It is said by the supreme court of Minnesota, in the case of *Crambie v. Little*,<sup>6</sup> that a copy of the judgment in foreclosure, with a direction indorsed thereon to the sheriff to execute it, is sufficient authority for the sheriff to make sale of the mortgaged property. It has been held that the sale of a railway on foreclosure of a

<sup>1</sup> *McDermot v. Barton*, 106 Cal. 194; s. c. 39 Pac. Rep. 538.

<sup>2</sup> *McDermot v. Barton*, 106 Cal. 194; s. c. 39 Pac. Rep. 538.

<sup>3</sup> 6 Dak. 21; s. c. 50 N. W. Rep. 478.

<sup>4</sup> *Fuller v. O'Neil*, 69 Tex. 349; s. c. 5 Am. St. Rep. 59; 6 S. W. Rep. 181.

<sup>5</sup> *Loveland v. Clark*, 11 Colo. 265; s. c. 18 Pac. Rep. 544.

<sup>6</sup> 47 Minn. 581; s. c. 50 N. W. Rep. 823.



mortgage made pursuant to consent decrees of two courts in different states, in each of which part of the railway property was situated, is valid; and the receiver of the company who made and reported the sale, and not the register, who performed no service, is entitled to commissions for making it, notwithstanding<sup>1</sup> a statute providing that any sales ordered to be made by a chancery court for the satisfaction of a mortgage debt shall be made by the register of the court ordering it.<sup>2</sup>

§ 473. **Duties of officer making sale.**—While the duties of the officer making the sale under a decree in a mortgage foreclosure are purely ministerial, yet he is invested with some degree of discretion which he is required to exercise in the interests of all parties to the suit in procuring the best sale that can be effected and getting the best price possible for the property. To this end it is his duty to see that the advertisement is published in a newspaper that will give the proposed sale general publicity.<sup>3</sup> And it has been said that a referee appointed to conduct a foreclosure sale must personally determine the time when the sale shall take place, and cannot delegate such duty to any other party to the proceeding, and must re-advertise where the auctioneer postpones the sale in his absence by the direction of the plaintiff's attorney.<sup>4</sup>

§ 473a. **Same—Appraisement.**—In most of the states one of the first duties of the officer appointed to make a sale under a decree of foreclosure is to cause the property to be appraised in accordance with the provisions of the statute regulating such sale. Those statutes generally require that the appraisement shall be made by disinterested freeholders upon actual view,<sup>5</sup> yet in some states it is not necessary

<sup>1</sup> As Ala. Code, 1836, § 3600.

<sup>2</sup> Rome & D. R. Co. v. Sibert, 97 Ala. 393; s. c. 12 So. Rep. 69.

<sup>3</sup> State *ex rel.*, Elliott v. Holliday, 35 Neb. 327; s. c. 53 N. W. Rep. 142.

<sup>4</sup> Shepard v. Whaley, 19 N. Y. Civ. Pro. 381; s. c. 13 N. Y. Supp. 532.

<sup>5</sup> See: *Ellenbogen v. Griffey*, 55 Ark. 268; s. c. 18 S. W. Rep. 126; *Alfred v. Bank of Hazelton*, 48 Kan. 124; s. c. 29 Pac. Rep. 471; *Stockmeyer v. Tobin*, 139 U. S. 176; bk. 35 L. ed. 123; s. c. 11 Sup. Ct. Rep. 504.



that the appraisers upon the sale of land under mortgage foreclosure go upon the property to appraise it, where they have a knowledge of the property.<sup>1</sup>

It is thought that a sale of mortgaged premises under foreclosure will not be set aside on the ground that the property was appraised too low, unless the actual value so greatly exceeds the appraised value as to raise a presumption of fraud in making the appraisement.<sup>2</sup> Neither will a foreclosure sale be vacated because one of the appraisers misconceived the manner of estimating the value of the property where it does not appear that such misconception resulted in an unfair appraisement.<sup>3</sup> And the owner of the equity of redemption in mortgaged premises cannot be heard to object to the confirmation of a sale on foreclosure because prior liens and incumbrances were not deducted in making the appraisement, as required by the provisions of the statute under which the sale is made, as such provisions are intended for the sole benefit of the mortgagee.<sup>4</sup> It has been said that the making of a second appraisement higher than the first, where mortgaged land is sold under an order of sale, which sale is vacated for irregularities and

**In Arkansas** appraisers appointed to appraise the value of land for the purpose of a sale under a mortgage, pursuant to Mansf. Dig. §§ 4759 4761, are not authorized to deduct the amount of prior liens from the estimated value of the land; and a sale for less than two thirds of the appraised value is void. *Ellenbogen v. Griffey*, 55 Ark. 268; s. c. 18 S. W. Rep. 126.

**In Kansas** an appraisement of mortgaged real estate on foreclosure, under the Civil Code, § 453, providing that the officer levying the execution shall call an inquest of three householders and administer an oath to appraise the property on actual view, and they shall forthwith return an estimate of the real value of the prop-

erty, is insufficient when the view is made before the oath is administered. *Alfred v. Bank of Hazelton*, 48 Kan. 124; s. c. 29 Pac. Rep. 471.

**In Louisiana** a sale under a mortgage is not illegal for want of an appraisement, where appraisement is dispensed with by the mortgage. *Stockmeyer v. Tobin*, 139 U. S. 176; bk. 35 L. ed. 123; s. c. 11 Sup. Ct. Rep. 504.

<sup>1</sup> *Zable v. Masonic Sav. Bank (Ky.)*, 16 S. W. Rep. 588.

<sup>2</sup> *Smith v. Foxworthy*, 39 Neb. 214; s. c. 57 N. W. Rep. 994.

<sup>3</sup> *Nebraska Loan & T. Co. v. Hamer*, 40 Neb. 281; s. c. 58 N. W. Rep. 695.

<sup>4</sup> *Smith v. Foxworthy*, 39 Neb. 214; s. c. 57 N. W. Rep. 994.

an alias order of sale issued, is not a valid objection on the part of the mortgagor to the confirmation of the sale.<sup>1</sup>

The supreme court of Nebraska, in the case of *Schultz v. Loomis*,<sup>2</sup> say that a foreclosure sale is void where the plaintiffs, having joint interest in the mortgage, declare it wholly due and collectible because of non-payment according to stipulations therein contained, and ask for the ascertainment of the whole amount secured by the mortgage, and a decree for much less than is really due is entered, and the appraisers deduct from the value of the property the balance omitted from the decree as being a lien on the property.

And the same court, in the case of the *Nebraska Loan and Trust Company v. Hamer*,<sup>3</sup> held that one whose only land was originally conveyed as security for debt by deed absolute in form, and who subsequently pays further moneys to the grantor under an agreement that the deed shall thenceforth be treated as absolute, is a freeholder capable of being an appraiser in a foreclosure sale.

§ 473b. **Same—Same—Objections to.**—It has been said that 'a value fixed upon real estate by appraisers in proceedings for a sale under foreclosure can be assailed only for fraud; and inadequacy of the appraised value alone is insufficient cause for setting aside a sale.'<sup>4</sup> Any objections as to the value fixed by appraisers in proceedings for a sale of real estate under foreclosure must be made promptly, and are held to be too late where not made until

<sup>1</sup> *Nebraska Loan & T. Co. v. Hamer*, 40 Neb. 281; s. c. 58 N. W. Rep. 695.

**New appraisal—Ohio statute.**—In the case of *Brown v. Connecticut Mutual Life Insurance Company*, 6 Ohio C. C. 62, it is said that the ordering of a new appraisal of property to be sold in foreclosure proceedings, where a sale has not been effected under a former appraisal, is governed by Ohio Revised Statutes, § 5417; and an order making an ap-

praisement and directing a sale on foreclosure under § 5416, which relates solely to property taken on execution, is a nullity and may be set aside on motion, and a new appraisal made under § 5417.

<sup>2</sup> 40 Neb. 152; s. c. 58 N. W. Rep. 693.

<sup>3</sup> 40 Neb. 281; s. c. 58 N. W. Rep. 695.

<sup>4</sup> *Ecklund v. Willis*, 44 Neb. 129; s. c. 62 N. W. Rep. 493.

after the sale has occurred. They should be made and filed in the case, with a motion to vacate the appraisement, prior to the sale.<sup>1</sup> And objections to the confirmation of the sale of real estate on foreclosure, on the ground that the appraisement is irregular and that the entire proceedings relative to the sale are irregular and not in accordance with the provisions of the law governing sheriff's sales, are not sufficient to be available, as the objections relied upon must be specifically assigned.<sup>2</sup>

§ 474. **Discretion of officer.**—It has been said that the officer conducting a foreclosure sale need not entertain any bids which are coupled with conditions not in conformity with the terms of the decree.<sup>3</sup> And a sale under a power in a trust deed is not invalidated by the fact that the land was sold in parcels, instead of *in solido*, and that the purchaser had made a map thereof, from which he read the description of the several pieces to the trustee, and which he used in making his bids without exhibiting it to the persons assembled at the sale, where no one requested to see it, and such purchaser would have permitted it to be seen by any one desiring to bid.<sup>4</sup>

§ 475. **Notice of sale.**—The statutes of most, if not all the states, require that a proper notice of a sale of the mortgaged premises be given.<sup>5</sup> Should such a sale be made without giving notice, as required by statute or the terms of the mortgage, it is void, and the legal relation between the parties remains unchanged; and a bill to redeem will not be barred until the lapse of the time fixed by the statute of limitations from the surrender of possession.<sup>6</sup> But it has been said that a sale under a power given by a

<sup>1</sup> *Ecklund v. Willis*, 44 Neb. 129; s. c. 62 N. W. Rep. 493.

<sup>2</sup> *Id.*

<sup>3</sup> *Nebraska Loan & T. Co. v. Hamer*, 40 Neb. 281; s. c. 58 N. W. Rep. 695.

<sup>4</sup> *Smith v. Deeson* (Miss. 1893), 14 So. Rep. 40.

<sup>5</sup> The provisions of the New York Code as to notice on fore-

closure of mortgages do not supersede the special statutes applicable to mortgages securing loans by the loan commissioners. *Barley v. Roosa*, 59 Hun (N. Y.) 617, mem; s. c. 35 N. Y. S. R. 898; 13 N. Y. Supp. 209; 20 Civ. Pro. Rep. 113.

<sup>6</sup> *Sanders v. Askew*, 79 Ala. 433.

mortgage, which provides for notice by publication, will be valid although there was an arrangement to prevent the mortgagor from having notice of such sale, where the notice required by the mortgage was given and the purchaser was not a party or privy to such arrangement.<sup>1</sup>

The Arkansas supreme court<sup>2</sup> have said that the trial court may direct a sale upon twenty days' notice, under a mortgage containing a power of sale, to be exercised on a notice of thirty days. On the other hand the supreme court of Virginia has held that the trial court in supervising a sale under a trust deed prohibiting a shorter notice than ten days at the least, should prescribe a reasonable notice of at least thirty days, where the property is valuable and abundant security for the debt, and direct its publication, not only in a newspaper as directed in the deed, but by hand-bills so posted as to bring the best prices obtainable for the property, where the debtor especially requests that such expense be then incurred.<sup>3</sup>

The general rule is that the names of the trustees in a trust deed may be signed to the notice of sale by others than themselves, with their authority.<sup>4</sup> And it has been said that the preparation of the notices of sale under a mortgage, under the supervision of an intending purchaser, will not affect the validity of the sale.<sup>5</sup>

§ 475a. Same—Defects in.—It is thought that defects

<sup>1</sup> Ritchie v. Judd, 137 Ill. 453; s. c. 27 N. E. Rep. 682.

<sup>2</sup> Johnson v. Meyer (Ark.), 16 S. W. Rep. 121.

<sup>3</sup> Morriss v. Virginia State Ins. Co., 90 Va. 370; s. c. 18 S. E. Rep. 843.

<sup>4</sup> Crutchfield v. Hewett, 2 App. Cas. D. C. 373; s. c. 22 Wash. L. Rep. 127.

Under the Missouri statute, 1889. § 7093, requiring the notice of sale to state the date of recording the trust deed, a sale of lands is not void, especially on collateral attack, where the notice gave the date of the instru-

ment itself and the book and page where it was recorded. Morgan v. Joy, 121 Mo. 677; s. c. 26 S. W. Rep. 670.

The performance of the mere ministerial acts of posting the notices and making the sale, by agents selected by the trustee under a trust deed authorizing the trustee to take possession on nonpayment does not affect the validity of the sale. Tyler v. Herring, 67 Miss. 169; s. c. 6 So. Rep. 840.

<sup>5</sup> Ritchie v. Judd, 137 Ill. 453; s. c. 27 N. E. Rep. 682.

in a notice of sale of mortgage sale, where not sufficient to deceive anyone, will not defeat the title acquired at the sale.<sup>1</sup> Thus it has been said the fact that a notice of mortgage foreclosure describes the land as in the wrong civil township is immaterial, where the land is otherwise sufficiently identified.<sup>2</sup> And it has been held that a sale under a foreclosure is not invalid through omission to state in the advertisement the town in which the property is situated, where the description was so complete otherwise as to identify the property; nor invalid because made by one as assignee of the mortgagee, while the bond filed described him as attorney.<sup>3</sup> On the same principal it has been held that a sale of mortgaged real property under a power is not invalid because the notice of sale does not sufficiently describe certain personal property also covered by the mortgage, especially where such description is as full as that in the mortgage.<sup>4</sup>

§ 476. **Contents of notice of sale.**—It is thought that a notice of sale under a mortgage or foreclosure decree is sufficient if the property be described therein in the same terms as in the mortgage or decree;<sup>5</sup> and a statement of the amount of the decree, although proper, is not essential to the validity of the notice.<sup>6</sup> Hence it has been said that

<sup>1</sup> *Bacon v. Northwestern Mut. L. Ins. Co.*, 131 U. S. 258; bk. 33 L. ed. 128; 9 Sup. Ct. Rep. 787.

<sup>2</sup> *Lindsey v. Delano*, 78 Iowa 350; s. c. 43 N. W. Rep. 218.

<sup>3</sup> *Dickerson v. Small*, 64 Md. 395; s. c. 1 Atl. Rep. 870; 1 Cent. Rep. 495.

<sup>4</sup> *First Nat. Bank v. Bell Silver & Copper Min. Co.*, 8 Mont. 32; s. c. 19 Pac. Rep. 403.

<sup>5</sup> *Miller v. Lanham*, 35 Neb. 886; s. c. 53 N. W. Rep. 1010.

**Insufficient description.**—It is held that notice of a mortgage sale, stating that for breach of conditions there will be sold at a certain time “on the premises, which are bounded

and described as follows, viz., a certain parcel of land,” describing it by metes and bounds, is not insufficient as not stating what was to be sold. *Streeter v. Ilsley*, 151 Mass. 291; s. c. 23 N. E. Rep. 837.

<sup>6</sup> *Stratton v. Reisdorph*, 35 Neb. 314; s. c. 53 N. W. Rep. 136. See: *Manwaring v. Jenison*, 61 Mich. 117; s. c. 27 N. W. Rep. 899.

**In Michigan** a notice of sale under a mortgage executed prior to the 1879 Amendment (How. Mich. Stat. § 6980), providing for like notice as for constable sales, is sufficient if it describes and locates the property, without giving the date or amount of the mortgage or names of parties,



a trustee's sale will not be affected by an inaccurate statement of the amount of the debt, contained in the notice of the sale, unless made for fraudulent purposes.<sup>1</sup>

The supreme court of Missouri have held that a description of a lot in a notice of sale under a mortgage, as a certain lot in a certain block in a certain person's addition to a town, is not insufficient, although the person has made three additions numbered respectively 1, 2, 3, and the lot to be sold is in the second, where there is reference to the plat, examination of which would show that such number in such plat could be only in the second addition.<sup>2</sup>

It is thought that the amount due is sufficiently stated in a notice of sale under a trust deed setting out the terms of a note secured thereby, and reciting a default and election to declare the same due and payable, with all interest thereon,—at least as against a bona fide purchaser at the sale after years of peaceful possession.<sup>3</sup>

§ 476a. Same—Describing improvements. — It is thought that it is not necessary, for an officer, on making sale of lands under an order of court, to describe the improvements on the premises, otherwise than as described in the writ.<sup>4</sup> Hence a sale of mortgaged premises, made under a power contained in the mortgage, will not be set aside because of the failure of the mortgagee to state in his advertisement of the sale the facts that improvements had been made on the premises, of which he did not know until the day of the sale, where they were obvious to those attending the sale.<sup>5</sup>

§ 476b. Same—On sale under power.—In those cases where the sale of the mortgaged premises is made under a power contained in the mortgage, a notice of foreclosure

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where there is but one mortgage on the property and it is duly filed. *Manwaring v. Jenison*, 61 Mich. 117; s. c. 27 N. W. Rep. 899.

<sup>1</sup> *Bowman v. Ash*, 36 Ill. App. 115.

<sup>2</sup> *Noland v. White* (Mo. 1895) 31 S. W. Rep. 341.

<sup>3</sup> *Reedy v. Millizen*, 155 Ill. 634; s. c. 40 N. E. Rep. 1028.

<sup>4</sup> *Guarantee Trust & S. D. Co. v. Jenkins*, 40 N. J. Eq. 451; s. c. 2 Atl. Rep. 13; 2 Cent. Rep. 173.

<sup>5</sup> *Austin v. Hatch*, 159 Mass. 98; s. c. 34 N. E. Rep. 95.



sale is not invalidated by failure to mention the amount of taxes on the premises, when, after stating the amount then claimed to be due upon the mortgage, it states that the premises will be sold for such debt and interest "and the taxes, if any, on said premises."<sup>1</sup> Neither is such a notice insufficient because of the omission of the words "will be sold," so that it reads "the said mortgaged premises at public auction for cash, to the highest bidder."<sup>2</sup> And in those cases where the deed of trust contains no provisions requiring the successor of the original trustee to recite in his notice of sale the circumstances which devolved the execution of the trust upon him, a misrecital, in such notice, of the ground upon which his right to act as trustee is based, is immaterial.<sup>3</sup>

§ 477. Publication of notice of sale.—The statutes in the various states regulate the publication of notice of sale under a mortgage foreclosure, and the requirements of these statutes must be strictly complied with, unless the parties have in the mortgage or deed of trust made a special provision or contract as to the publication of notice; in that case the provision or contract controls and must be strictly complied with.<sup>4</sup> Thus it is said that an advertisement inserted on Sunday the fourth, of sale under a trust deed to take place on the fifteenth, is sufficient where the deed provides that the advertisement is to be "ten days at the least."<sup>5</sup> And the civil court of appeals of Texas, in the case of *Lerch v. Hill*,<sup>6</sup> say that a sale under a power in a

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<sup>1</sup> *Kirkpatrick v. Lewis*, 46 Minn. 164; s. c. 1, 48 N. W. Rep. 783, aff'g on rehearing 47 N. W. Rep. 970.

<sup>2</sup> *Nau v. Brunette*, 79 Wis. 664; s. c. 48 N. W. Rep. 649.

<sup>3</sup> *Irish v. Antioch College*, 126 Ill. 474; s. c. 18 N. E. Rep. 768.

<sup>4</sup> In Illinois, however, it is held that the statute requiring notice of sale under a power in a mortgage to be published once a week for four successive weeks controls, although the

mortgage provides for a different notice. See: *Cornell v. Newkirk*, 144 Ill. 241; s. c. 33 N. E. Rep. 37, aff'g 44 Ill. App. 487. But a failure to comply with the provisions of the statute does not render the sale void, but only voidable. *Id.*

<sup>5</sup> *Morris v. Virginia State Ins. Co.* (Va.), 18 S. E. Rep. 843.

<sup>6</sup> 2 Tex. Civ. App. 421; s. c. 21 S. W. Rep. 183.

deed of trust requiring the land to be sold after advertisement of ten days is void where the first publication is made on the eighth and the sale takes place on the eighteenth of the same month.

While it is the duty of the officer making the sale<sup>1</sup> to see that the advertisement is published in a newspaper that will give it general publicity, yet the supreme court of California, in the case of Northern Counties Investment Trust v. Cadman,<sup>2</sup> say that a plaintiff in a mortgage foreclosure suit cannot control the sheriff as to the particular newspaper in which the notice of foreclosure sale shall be published, and the sheriff may lawfully publish it the requisite number of times and in a weekly paper, although he has been directed by the plaintiff to publish it in a certain daily paper in which the plaintiff has contracted to have it published. The supreme court of Nebraska, in the case of Smith v. Foxworthy,<sup>3</sup> say that the statute of that state requiring the notice of sale under foreclosure of a mortgage to be published in "some newspaper printed in the county, in general circulation therein," does not require that the newspaper in which such notice is published shall have a general circulation in any particular city or portion of the county in which the land is situated.

The supreme court of Missouri have held that an omission in the printer's affidavit to recite the proper and sufficient publications of notice of a sale under a deed of trust does not vitiate the sale, where the trustee's deed is correct and strictly formal and states that the proper notice has been given, and the publication was in fact properly made.<sup>4</sup>

§ 477a. Same—Notice of adjourned sale.—In those cases where, for any reason, the sale is not made on the day advertised, and the sale is adjourned to another day, due

<sup>1</sup> As to duty of officer making sale under mortgage foreclosure. See: *Ante*, § 473.

<sup>3</sup> 39 Neb. 214; s. c. 57 N. W. Rep. 994.

<sup>2</sup> 101 Cal. 200; s. c. 35 Pac. Rep.

<sup>4</sup> Gray v. Worst, 129 Mo. 122; s. c. 31 S. W. Rep. 585.

notice should be given by publication of such adjournment and the day and hour the sale is adjourned to. In this, as in the original publication, the statute should be strictly complied with. But exception for want of due publication of the adjournment sale should be promptly taken, and the question of the want of such publication cannot be raised collaterally. The supreme court of New York, in the case of *Bechstein v. Schultz*,<sup>1</sup> say that the omission to publish a notice of an adjournment of a foreclosure sale from August nineteenth to September second, until September fourth of the same year, that being the day on which the sale actually took place, as required by the New York Code,<sup>2</sup> was not a valid objection by the defendant to accepting title from the plaintiff, who derived his title through a judgment in the foreclosure suit, it appearing that more than two years had elapsed from the date of confirmation of the sale without objection by any of the parties.

§ 477b. Same—Mortgage with power of sale.—It is thought that the advertisement of a sale by an administrator of a mortgagee in whom, his administrators and assigns, a power of sale was vested, may properly be signed by him as assignee of the mortgagee, without setting out that the assignment was by act of law, and not by act of the parties.<sup>3</sup> It is held in Minnesota that a notice of sale under a mortgage with power of sale, covering separate tracts of land lying in different counties, need be published only in a newspaper in any one of such counties, under a statute,<sup>4</sup> providing that the notice shall be published in a newspaper printed and published in the county where the premises intended to be sold, “or some part thereof” are situated.<sup>5</sup> It is said that the Illinois statute, requiring

<sup>1</sup> 45 Hun (N. Y.) 191; s. c. 9 N. Y. S. R. 815.

<sup>2</sup> N. Y. Code Civ. Proc., § 1678.

<sup>3</sup> *Thurber v. Carpenter* (R. I. 1895), 31 Atl. Rep. 5.

<sup>4</sup> Minn. Gen. Stat., 1878, c. 81, § 5.

<sup>5</sup> *Paulle v. Wallis*, 58 Minn. 192; s. c. 59 N. W. Rep. 999.

In Maryland a sale of mortgaged premises under the Code, 1833, art. 66, by virtue of a consent thereto contained in the mortgage, may properly be advertised in the city of Baltimore and confirmed by the circuit court of that city, when at the time of the sale the mortgaged property is within the

notice of sale under a power in a mortgage to be published once in a week for four successive weeks controls, although the mortgage provides for a different notice.<sup>1</sup> But a sale under such power is not void, but only voidable, because of failure to comply with the statute requiring notice to be published for four successive weeks, where actual notice is given and the property sells for its full value.<sup>2</sup> A sale, however, under a naked power of sale in a trust deed is invalid where, after three days' publication of notice, it is discovered that the day advertised for the sale will fall on Sunday, whereupon the notice is changed to read the following day, and as thus corrected is published, after the change is made, one day less than the time which is required by the trust deed.<sup>3</sup>

§ 477c. **Same—Time of publication.**—The time notices of sale are required to be published or posted varies under the statutes of the different states and of the United States; but whatever the provision of the statute in this regard it must be substantially complied with. Thus in a case where the notice of sale was regularly published for six successive weeks, and the sale was adjourned, and nothing but the notice of adjournment published, which did not contain the requisite elements of a notice of sale, the publication was held not to be sufficient to authorize the sale of the mortgaged premises.<sup>4</sup>

In the case of *Stowe v. Merrill*<sup>5</sup> it is said that notice of foreclosure published in three successive issues of a weekly newspaper, and recorded the next day after the last publication, is sufficient, under the statutes of Maine.<sup>6</sup> It is said in *First National Bank v. Bell Silver and Copper Mining*

city limits, though it was not so when the mortgage was made. *Roberts v. Loyola Perpetual Bldg. Assoc.*, 74 Md. 1; s. c. 21 Atl. Rep. 684.

<sup>1</sup> *Cornell v. Newkirk*, 144 Ill. 241; s. c. 33 N. E. Rep. 37, aff'g. 44 Ill. App. 487.

<sup>2</sup> *Cornell v. Newkirk*, 144 Ill. 241;

s. c. 33 N. E. Rep. 37, aff'g. 44 Ill. App. 487.

<sup>3</sup> *Wolff v. Ward*, 104 Mo. 127; s. c. 16 S. W. Rep. 161.

<sup>4</sup> *Sanborn v. Petter*, 35 Minn. 449; s. c. 29 N. W. Rep. 64.

<sup>5</sup> 77 Me. 550; s. c. 1 Atl. Rep. 684; 1 N. Eng. Rep. 291.

<sup>6</sup> Me. Rev. Stat. c. 90, § 5.

Company<sup>1</sup> that the provisions of the Montana statute for "thirty days' notice" of a sale under a power in a mortgage, by publishing once a week for three weeks successively, does not require that all three publications shall be thirty days before the sale, but only that the first one shall be. In *Alexander v. Messervey*<sup>2</sup> it is held that an advertisement of a foreclosure sale in a newspaper once a week for three weeks, though full twenty-one days do not elapse between the first publication and the sale, complies with the South Carolina statute,<sup>3</sup> providing that notices of sale "shall be advertised for twenty-one days prior to the sale,—that is to say, once a week for at least three weeks prior thereto." The supreme court of Texas, in the case of *Howard v. Fulton*,<sup>4</sup> say that under a trust deed authorizing the trustee to sell the land after advertising notice of sale in some newspaper for at least thirty days prior to the day of sale, such publication to be made four times in succession, does not require that the last publication shall be thirty days before the day of sale. It has been said that a mortgage sale of lands and a commissioner's deed obtained in a United States circuit court proceeding on a publication of the warning order for only ten consecutive days, instead of not less than once a week for six consecutive weeks, as required by the United States statutes,<sup>5</sup> is absolutely void as to persons having an interest, equitable or otherwise in the land sold and who were not before the court.<sup>6</sup>

§ 477d. **Same—Place of publication—Religious paper with news column.**—Under a statute requiring that notices of sale be published for a certain length of time, a weekly paper, containing principally religious news, of interest to a particular denomination, but containing a column devoted to the general news of the day, embracing every sort of

<sup>1</sup> 8 Mont. 326; s. c. 19 Pac. Rep. 403.

<sup>2</sup> 35 S. C. 409; s. c. 14 S. E. Rep. 334.

<sup>3</sup> S. C. Gen. Stat. § 2424.

<sup>4</sup> 79 Tex. 231; s. c. 14 S. W. Rep. 1061.

<sup>5</sup> 1 Supp. U. S. Rev. Stat. p. 176.

<sup>6</sup> *Mercantile Trust Co. v. South Park Residence Co. (Ky.)*, 22 S. W. Rep. 314; s. c. 15 Ky. L. Rep. 70.



news of interest to the general reader, is a "newspaper," within the meaning of the statute in which notice of a sale on mortgage foreclosure may be published.<sup>1</sup>

§ 477e. **Same—Posting statutory notice.**—In some statutes it is provided, and also in some trust deeds and mortgages, that notice of a sale of the mortgaged premises shall be given by posting notices thereof in a specified manner. It is said that posting a notice of sale in the corridor of the court house, on boards provided by the county for the posting of public notices, is a sufficient compliance with a provision in a trust deed that a sale thereunder shall be at the court house door, and the notice be posted at the place of sale.<sup>2</sup> But in all cases where notice is given by posting, strict proof of the posting of the statutory notices of sale must appear of record in the mortgage foreclosure; the statement in regard thereto by the officer in his report of sale will not cure a defect in the affidavit upon which such report rests as proof.<sup>3</sup>

§ 477f. **Same—Service of notice.**—In some states the statute requires the notice to be served upon the person actually in possession of the mortgaged premises. Under such a statute the supposition that a person to whom a copy of a foreclosure notice is delivered was in actual possession of the mortgaged premises does not affect the validity of the service, if such person was one whom the statute authorized service upon as one of suitable age and discretion.<sup>4</sup> In Pennsylvania it is held that the sheriff's return upon a *levari facias sur mortgage* should show the service upon the defendant of the notice of the sale and advertisement required by the statute,<sup>5</sup> or should show that the defendant could not be found.<sup>6</sup>

<sup>1</sup> Hull v. King, 38 Minn. 349; s. c. 37 N. W. Rep. 792.

<sup>2</sup> Howard v. Fulton, 79 Tex. 231; s. c. 14 S. W. Rep. 1061.

<sup>3</sup> New York Baptist University for Ministerial Education v. Atwell, 95 Mich. 239; s. c. 54 N. W. Rep. 760.

<sup>4</sup> Groff v. National Bank of Commerce, 50 Minn. 348; s. c. 52 N. W. Rep. 934.

<sup>5</sup> Pa. Act 1705, § 4.

<sup>6</sup> Gibbons v. Williams (Pa. C. P.), 10 Pa. Co. Ct. 299; s. c. 6 Kulp 277.



In New York it is held that an assignee in bankruptcy is not entitled to notice of sale on foreclosure by advertisement, unless the conveyance to him is recorded at the time of the first publication of notice; he being a subsequent grantee upon whom service of the notice is required, under the New York statute,<sup>1</sup> only in case his conveyance is upon record at the time of such publication.<sup>2</sup>

§ 478. **When sale to be made—Hour of day.**—The notice of sale should state the place where the sale is to be made and the hour when it is to take place. It has been said that a notice of foreclosure by advertisement, stating that the sale will be held at the court-house in a designated village and county, sufficiently describes the place of sale.<sup>3</sup> And the fact that notice of a trustee's sale under a trust deed does not specify between what hours the sale is to occur, will not invalidate the sale in those cases where neither the statute nor the deed require such designation.<sup>4</sup> The notice should not fix the day of sale upon a holiday,<sup>5</sup> but a sale in mortgage foreclosure may properly be made during Christmas week.<sup>6</sup> Neither should a sale be at an unusual hour of the day. Where the hour is unusual or unsuitable, this will be sufficient to warrant the court in setting aside the sale, particularly when to that fact is added great inadequacy of price.<sup>7</sup> It is said by the supreme court of Mississippi, in the case of *Goodman v. Durant Building and Loan Association*,<sup>8</sup> that authority in a mort-

<sup>1</sup> N. Y. Code Civ. Proc. § 2388.

<sup>2</sup> *Ostrander v. Hart*, 30 N. E. Rep. 504; s. c. 43 N. Y. S. R. 910, aff'g on rehearing 130 N. Y. 406; s. c. 29 N. E. Rep. 744; 42 N. Y. S. R. 513.

<sup>3</sup> *McCammon v. Detroit L. & N.R. Co.* (Mich 1894), 61 N. W. Rep. 273.

<sup>4</sup> *Meier v. Meier*, 105 Mo. 411; s. c. 16 S. W. Rep. 223.

<sup>5</sup> In Missouri a sale under a power in a mortgage upon a public holiday is not void, under Missouri Revised Statutes 1879, §§ 551, 1054, 4039, providing that on the holidays named therein certain specified business, not

including mortgage sales, shall not be transacted. *Stewart v. Brown*, 112 Mo. 171; s. c. 16 S. W. Rep. 389; 20 *Id.* 451.

<sup>6</sup> *Anderson v. White*, 2 App. Cas. D. C. 408; s. c. 22 Wash. L. Rep. 159.

<sup>7</sup> *Holdsworth v. Shannon*, 113 Mo. 508; s. c. 21 S. W. Rep. 85; *Id.* 89; *Fowler v. Taylor*, 19 D. C. 456; s. c. 19 Wash. L. Rep. 131. See: *Post*, § 536 *et seq.*

<sup>8</sup> 71 Miss. 310; s. c. 14 So. Rep. 146.

gage to the donee of the power to designate the time, place, and terms of sale, is not taken away by the Mississippi statute,<sup>1</sup> providing that if a mortgage with power of sale is silent as to the place of sale, the sale may be made at such place as is required for sheriff's sales.

§ 479. **Sale to be made at time advertised—Place of sale.**—Sales of mortgaged premises under foreclosure proceedings are usually made at the seat of justice of the county in which the land is situated, unless the debtor seasonably requires the sale to be made on the premises.<sup>2</sup> And a sale of property under a power in a deed of trust requiring the sale to be made at the county-seat of a designated county is void where it is made at a place which never was such county-seat.<sup>3</sup>

The place of sale is within the sound discretion of the trustee in a trust deed, where the deed contains no stipulation in respect thereto. Such discretion, however, should be exercised fairly and prudently.<sup>4</sup> But the sale must be made at the time when advertised to take place. A sale will be void where made before the time specified in the notice of sale, except when occasioned by the ordinary variance in timepieces; and a difference of fifteen minutes cannot be attributed to that cause.<sup>5</sup> But it is said that the record of a certificate of a sale on foreclosure, stating that the sale was had at the time stated in the notice of sale, and also at another time, is no basis to estop proof of the actual time of sale.<sup>6</sup>

<sup>1</sup> Miss. Code, 1892, § 2484.

<sup>2</sup> Stockmeyer v. Tobin, 139 U. S. 176; bk. 35 L. ed. 123; s. c. 11 Sup. Ct. Rep. 504. See: Morriss v. Virginia State Ins. Co., 90 Va. 370; s. c. 18 S. E. Rep. 843.

A sale under a trust deed for \$12,000, not prescribing the place of sale, of land claimed to be worth \$25,000, should be held upon the premises, where the debtor requests it and claims that it is not necessary to sell the whole, and that the appearance and situation of the property will in-

crease the prospects of a good sale when it is made in view of the bidders. Morriss v. Virginia State Ins. Co., 90 Va. 370; s. c. 18 S. E. Rep. 843.

<sup>3</sup> Durrell v. Farwell (Tex. Civ. App.), 27 S. W. Rep. 795, affd. in part and rev'd in part in 30 S. W. Rep. 539, and rev'd in 31 S. W. Rep. 185.

<sup>4</sup> Morriss v. Virginia State Ins. Co., 90 Va. 370; s. c. 18 S. E. Rep. 843.

<sup>5</sup> Richards v. Finnegan, 45 Minn. 208; s. c. 47 N. W. Rep. 788.

<sup>6</sup> *Id.*

§ 479a. **Same—At door of court house.**—Where a sale of mortgaged lands is made at the seat of justice of the county, or district in which they are situated, it usually takes place at the door of the court house. And it has been held that a sale made by a trustee under a deed of trust requiring it to be held “at the door of the court house in a county wherein the premises are situated” is properly held at the court house in the county seat of such county, although there is a second court house at another place in the county.<sup>1</sup> It is thought that where by the terms of a mortgage or deed of trust the sale thereunder is required to be made at the court house door, it may be made at the door of a temporary court house selected and occupied by the proper authorities, where the court house proper has been destroyed or abandoned.<sup>2</sup> But the supreme court of Texas, in the case of *Boone v. Miller*,<sup>3</sup> say that a sale of land under a power in a deed of trust providing for a sale at the court house door is invalid under the Texas statute,<sup>4</sup> providing that where there is no court house in a county the door of the house where the district court was last held shall be deemed to be the court house door, if made at

<sup>1</sup> *Gray v. Worst*, 129 Mo. 122 ; s.c. 31 S. W. Rep. 585.

<sup>2</sup> *Johnson v. Cocks*, 37 Minn. 530 ; s. c. 35 N. W. Rep. 436 ; *Riggs v. Owen*, 120 Mo. 176 ; s. c. 25 S. W. Rep. 356 ; *Davis v. Hess*, 103 Mo. 31 ; s. c. 15 S. W. Rep. 324. See: *Boone v. Miller*, 86 Tex. 74 ; s. c. 23 S. W. Rep. 574.

Where a county court house had been partly destroyed by fire, and rooms had been rented in another place by the county commissioners for several months for the temporary use of some of the county officers and for all the court rooms in Minnesota, there is no irregularity in advertising or in holding the sheriff's sale at the front door of such building. *Johnson v. Cocks*, 37 Minn. 530 ; s. c. 35 N. W. Rep. 436.

In Missouri, however, a different rule has been laid down. See : *Stewart v. Brown*, 112 Mo. 171 ; s. c. 20 S. W. Rep. 451.

**Sale at door of new and unfinished structure.**—A sale under a deed of trust providing for sale at a the court house door is properly made at the door of a new and unfinished court house proper, the old one having been removed and the terms of court held in other buildings leased for the purpose, where the sale was well attended and there is no evidence that anyone was misled as to the place of sale. *Davis v. Hess*, 103 Mo. 31 ; s. c. 15 S. W. Rep. 324

<sup>3</sup> 86 Tex. 74 ; s. c. 23 S. W. Rep. 574.

<sup>4</sup> Tex. Rev. Stat. Art. 2310.

another place than that appointed for holding the district court; although it was at the door of a house used and occupied by the commissioners' court and county court of the county. The supreme court of Missouri hold, however, that a sale under a deed of trust will not be set aside upon the ground that it was not made at the court house door, that it was not an open public sale as provided by the deed of trust, and that the property was not struck off to the highest bidder, where it appears that it was made in the vestibule in front of the court house door, at the usual hour and in the usual manner of public sales at that place, and that the property was not then struck off to the highest bidder on account of the interruption of the plaintiff seeking to have the sale set aside, in order that he might make his bid good.<sup>1</sup> In those cases where a trust deed provides for a sale of the property at the front door of the court house, the sale will not be set aside on the ground that it should have been made from the front of the door leading to the court room, where there are three front doors, and it was made in front of one, in full view of all the other doors;<sup>2</sup> but when a particular door of a building is named in the trust deed or mortgage at which the sale shall be made, a sale made anywhere else will be invalid. Thus it has been held that a sale under a power in a deed of trust to sell "at the east court house door," will be set aside when held at the north door of another building at a distance, in a different neighborhood, to which the circuit court removed upon the partial destruction by fire of the court house existing at the date of the deed, the county and probate courts being removed to a third building at a distance from the others, and the property bringing but half its value because of doubts of the bidders as to the validity of the sale.<sup>3</sup> And it has also been said that a sale under a power in a mortgage which provides that sale thereunder

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<sup>1</sup> *Maloney v. Webb*, 112 Mo. 575; s. c. 20 S. W. Rep. 683.

<sup>3</sup> *Stewart v. Brown*, 112 Mo. 171; s. c. 20 S. W. Rep. 451.

<sup>2</sup> *Martin v. Barth* (Colo. App.), 36 Pac. Rep. 72.

shall be held at the east door of the court house in a city named must be made at the east door of the court house in existence when the mortgage was made, although at the time of sale it has been partially destroyed by fire and the courts are at the time held in other buildings in a different part of the city.<sup>1</sup>

§ 480. **Terms and conditions of sale.**—While it is true that the parties to a mortgage or trust deed may, by consent, authorize a sale of mortgaged premises upon such terms as they see fit,<sup>2</sup> yet it is a well settled principle that on a foreclosure the sale must be made in accordance with the decree of the court, and its terms cannot be changed by agreement of parties or counsel, which are not incorporated in the record.<sup>3</sup> Thus where the decree is that the property be sold for cash, a sale on time will be improper,<sup>4</sup> though not void as to the mortgagor,<sup>5</sup> or his privies, where such mortgagor has obtained the credit and benefit of the amount bid.<sup>6</sup> And it has been held that where the mort-

<sup>1</sup> *Stewart v. Brown*, 112 Mo. 171; s. c. 16 S. W. Rep. 389. *Compare*: *Johnson v. Cocks*, 37 Minn. 530; s. c. 35 N. W. Rep. 436; *Riggs v. Owens*, 120 Mo. 176; s. c. 25 S. W. Rep. 536; *Davis v. Hess*, 103 Mo. 31; s. c. 15 S. W. Rep. 324; *Boone v. Miller*, 86 Tex. 74; s. c. 23 S. W. Rep. 574.

<sup>2</sup> See: *Ante*, § 24a.

**An agreement between a mortgagee and a foreclosure purchaser**, that he should bid off the property and hold it in trust to pay a certain creditor of the mortgagor, renders such sale inoperative as a foreclosure of the creditor's claim. *Whitney v. Leominster Sav. Bank*, 141 Mass. 85; s. c. 6 N. E. Rep. 551; 2 N. Eng. Rep. 221.

<sup>3</sup> *Nebraska Loan & T. Co. v. Hamer* 40 Neb. 281; s. c. 58 N. W. Rep. 695.

**Under South Carolina supreme court rule 35**, a decree of resale of mortgaged lands is not invalid, be-

cause it required one third of the bid to be deposited, thus tending to chill bidding. *Tyer v. Charleston Rice Milling Co.*, 32 S. C. 598, mem.; 10 S. E. Rep. 1c67.

<sup>4</sup> **A decree in foreclosure for a sale upon credit**, barring redemption, is improper when the deed of trust provides for a cash sale with right of redemption in the mortgagor. *Clark v. Jones*, 93 Tenn. 639; s. c. 27 S. W. Rep. 1009; 42 Am. St. Rep. 931.

<sup>5</sup> *Durden v. Whetstone*, 92 Ala. 480; s. c. 9 So. Rep. 176.

**A mortgagee cannot object** that a prior mortgagee allowed the property on foreclosure to be bid in by heirs of the debtor without payment, where no fraud is shown. *Sanger v. Nightingale*, 122 U. S. 176; bk. 30 L. ed. 1105; s. c. 7 Sup. Ct. Rep. 1109.

<sup>6</sup> Thus the supreme court of Alabama say in the case of *Jones v. Hagler*, 95 Ala. 529; s. c. 10 So. Rep.



gagor purchases at a sale under the mortgage, the fact that he is entitled to any surplus does not make his receipt receivable as a cash payment, although the amount of his bid exceeds the debt and costs by more than the amount of such payment.<sup>1</sup>

It is thought that an allowance by the attorney of the mortgagee, of a "short time" to the purchaser of land under a power in a mortgage providing for a cash sale, is to be regarded as a mere temporary arrangement to allow him to obtain the balance of the purchase price, and not as an agreement to treat the sale as completed on the basis of a part payment in cash and a credit for the balance, where there is no agreement to make a deed upon the part payment, or to postpone the payment of the balance for a definite period.<sup>2</sup>

It has been said that where a trust deed provides for a sale for cash, and the creditor instructs the trustee to accept in payment only gold and silver or legal tender currency, the announcement of that fact at the sale, without any fraudulent purpose, will not vitiate the sale.<sup>3</sup> And in those cases where the trust deed provides that a sale under the power shall be for cash, a requirement by the trustee that ten per cent. of any bid made shall be deposited when the sale is adjudged, is a reasonable precaution to avoid the necessity of a resale, and will not avoid the sale, particularly where no solvent and apparently honest bidder has been deprived of an opportunity to buy at the sale, or applied for a further reasonable delay that he might have an opportunity to make good his bid.<sup>4</sup>

§ 480a. Same.—Where only part of debt due.—Where the whole of the mortgage debt is due the mortgagee is en-

345, that where the grantor in a trust deed has obtained the credit and benefit of the amount bid at the trustee's sale, neither he nor any other person who was not a beneficiary can complain because the payment was not made in cash.

<sup>1</sup> Fishburne v. Smith, 34 S. C. 330; s. c. 13 S. E. Rep. 525.

<sup>2</sup> Atkins v. Tutwiler, 98 Ala. 129; s. c. 11 So. Rep. 640.

<sup>3</sup> Lallance v. Fisher, 29 W. Va. 512; s. c. 2 S. E. Rep. 775.

<sup>4</sup> Smith v. Deeson (Miss. 1893), 14 So. Rep. 40.



titled to have it sold for cash ; but where a portion only is due, it is thought the property should be sold for cash to meet the matured note or bond, and on terms of credit to correspond to the unmatured notes or bonds.<sup>1</sup> But it is said that the mortgaged property may be sold for cash to pay installments falling due after the commencement of a suit to foreclose it, in which the petition asks a sale for cash to pay a matured installment, and that credit be given for the balance of the price to meet the other installments.<sup>2</sup>

§ 480b. Same.—Deductions from purchase price.—The supreme court of New York, in the case of *Schell v. Elkins*,<sup>3</sup> say that a purchaser of lands at foreclosure sale, the terms of which provide that accrued taxes shall be deducted from the purchase price, is entitled to a deduction of the taxes as they were at the date of the sale, although between the sale and the confirmation thereof a law was passed reducing the amount of accrued and delinquent taxes on lands. But a purchaser at a foreclosure sale made pursuant to a decree holding certain debts to be of a preferential character cannot be heard to complain of the allowance of one of such debts against the property, in those cases where the property was sold subject thereto.<sup>4</sup>

§ 480c. Same.—Failure to complete purchase.—In those cases where the purchaser at a mortgage foreclosure sale fails, within a reasonable time, to execute his sale bonds at a judicial sale, the officer may, on the same day, re-offer the property without readvertising.<sup>5</sup> A purchaser at such a sale for cash is not excused from completing his bid by the pendency at the date of a suit by the mortgagor merely contesting certain items of indebtedness claimed to be secured by the mortgage, without denying the right to sell under the power therein, or that the sale was regular.<sup>6</sup> In

<sup>1</sup> *Penouilh v. Abraham*, 44 La. An. 188; s. c. 10 So. Rep. 676.

<sup>2</sup> *Id.*

<sup>3</sup> 10 N. Y. Supp. 167; s. c. 31 N. Y. S. R. 197.

<sup>4</sup> *St. Louis S. W. R. Co. v. Stark*, 55 Fed. Rep. 758.

<sup>5</sup> *Wilson v. Thorn* (Ky.), 11 Ky. L. Rep. 945; s. c. 13 S. W. Rep. 365.

<sup>6</sup> *Atkins v. Tutwiler*, 98 Ala. 129; s. c. 11 So. Rep. 640.

those cases where the purchaser neglects to pay the balance of the purchase price until the mortgagee has elected to treat the contract of purchase as abandoned, and has transferred all his interests to another, the purchaser can not, as against that other, redeem the premises from the mortgage and enforce his purchase.<sup>1</sup> And a purchaser who takes possession under a mortgage foreclosure sale of land without complying with his bid by paying the balance of the purchase price at the time agreed upon, is accountable for rents and profits, his possession being the same as that of a mortgagee before foreclosure.<sup>2</sup>

§ 482. Sale on credit unsatisfied prior liens.—While the mortgagee is entitled to have the mortgaged property sold for cash where the whole of the mortgaged debt is due,<sup>3</sup> yet the court may order the land to be sold partly for cash and partly on time. A purchaser at such a sale is not prejudiced by being required to execute a bond for the purchase price, although there were prior unsatisfied liens on the land, where the purchase money unpaid is sufficient to satisfy them, as he has the right to apply enough of the purchase money to satisfy the lien and obtain credit therefor.<sup>4</sup> On such a sale where the purchaser gives ample security to pay any balance that might be found due from him, a delivery of the deed upon the receipt of the amount of cash required by the judgment, and the balance of the purchase price in securities, as authorized by the judgment, is valid.<sup>5</sup>

§ 482a. Whole property subject to sale.—Mortgages are no longer regarded as conveyances of the land, but merely as securities for the payment of money, or the performance of contracts; they are our highest class of securities, and in some respects are more than a lien; they are formal pledges of the land. For this reason no part of the

<sup>1</sup> *Atkins v. Tutwiler*, 98 Ala. 129; 11 So. Rep. 640.

<sup>2</sup> *Id.*

<sup>3</sup> See: Ante, §§ 480, 480a.

<sup>4</sup> *Cornwall v. Falls City Bank*, 18

S. W. Rep. 452; s. c. 13 Ky. L. Rep. 606.

<sup>5</sup> *Farmers Loan & T. Co. v. Bankers & M. Teleg. Co.*, 119 N. Y. 15; 28 N. Y. S. R. 613; 23 N. E. Rep. 173.

mortgaged land is exempt from sale in satisfaction of the mortgage by virtue of a statute exempting property to a certain value "from levy and sale on execution issued upon any judgment obtained upon contract."<sup>1</sup> And a statute exempting from forced sale a portion of the property of the decedent, for the benefit of his widow and children, has no force against a mortgage.<sup>2</sup>

In the case of *Watson v. Blymer Manufacturing Company*<sup>3</sup> the lower court, in giving judgment against two mortgagors, the estate of one of whom was then in probate, ordered all property named in the mortgage to be sold. On appeal it was held that unless it appeared that the mortgage was a partnership transaction and covered partnership property, only the interest of the mortgagor living should have been ordered sold, and the judgment should have been certified to the county court for observance.

§ 482b. **Certificate of sale—Form of.**—In many of the states there are statutes requiring that the officer making the sale shall give to the purchaser at such sale a "certificate of sale." Such certificate, to be valid, must conform to the letter of the statute authorizing and directing it.<sup>4</sup>

§ 483. **Order staying sale.**—After a decree of sale has been entered a mortgage foreclosure may properly be stayed until further order, and the plaintiff be directed to convey the mortgaged lands and the suit to persons paying into court the sum due, at the instance of a lessee who was not made party to the foreclosure.<sup>5</sup> But the defendant in foreclosure proceedings is not entitled to a stay of the execution unless request therefor is made within the time required by statute from the rendition of the decree.<sup>6</sup> It has been held

<sup>1</sup> *Bryar's Appeal*, 111 Pa. St. 81 (1886); s. c. 2 Atl. Rep. 344; 1 Cent. Rep. 867; *Gangwere's Appeal*, 36 Pa. St. 466.

<sup>2</sup> *Bryar's Appeal*, 111 Pa. St. 81 (1886); s. c. 2 Atl. Rep. 344; 1 Cent. Rep. 867; *Nerpel's Appeal*, 91 Pa. St. 334.

<sup>3</sup> 66 Tex. 558; s. c. 2 S. W. Rep. 353.

<sup>4</sup> See: *Nelson v. Central Land Co.*, 35 Minn. 408; s. c. 29 N. W. Rep. 121.

<sup>5</sup> *Collins v. Cunningham*, 21 Can. s. c. 139.

<sup>6</sup> Under *Nebraska Code Civil*

that sixty days is not an unreasonably short time within which to require payments of the amount due as a condition of an injunction against sale under a trust deed.<sup>1</sup>

§ 483a. **Restraining sale.**—On a proper showing a court of equity may restrain a sale under a mortgage foreclosure proceedings. Thus it is said by the supreme court of Virginia, in the case of *Morriss v. Virginia State Insurance Company*,<sup>2</sup> that an injunction to restrain a sale under a trust deed for \$12,000 of property worth \$25,000, at a place without the county where the land is situated, should not be dissolved where the debtor claims that the appearance and situation of the property will increase the prospects of a good sale if it is in view of the bidders; and the debt is safely secured and it may not be necessary to sell the whole of the property. But in such cases the court should retain the cause and direct the sale to be made under its supervision, ordering a division into portions, and selling only so much as may be necessary to satisfy the debt.

The supreme court of Illinois, in the case of *Hollingsworth v. Koon*,<sup>3</sup> held by a divided court that upon a bill to restrain the sale of land embraced in two mortgages, until an account can be taken, the court, after ascertaining the total amount due, should apportion the amount so that lands embraced in the separate mortgages should bear their just proportion of the indebtedness, and direct a sale of the same, with the usual statutory redemption, and out of the proceeds order payment of the sums found due on each one.

**Procedure**, § 477b, providing that the order of sale shall be stayed whenever the defendant shall, within twenty days after the rendition of the decree, file a written request for the same, provided that if he makes no such request within said twenty days the order of sale may issue immedi-

ately. *State ex rel Harris v. Laflin*, 40 Neb. 441; s. c. 58 N. W. Rep. 936.

<sup>1</sup> *Joiner v. Enos*, 23 Ill. App. 224.

<sup>2</sup> 90 Va. 370; s. c. 18 S. E. Rep. 843.

<sup>3</sup> 117 Ill. 511; s. c. 6 N. E. Rep. 148; 8 *Id.* 193; 6 West. Rep. 49.

## CHAPTER XXIII.

### SALE OF MORTGAGED PREMISES IN PARCELS.

DISCRETION OF COURT—WHEN TO BE MADE—PART ONLY DUE—SALE FOR AN  
INSTALLMENT—STAYED ON PAYMENT—FUTURE DEFAULTS.

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| <p>§ 484. Sale in parcels—Discretion of court.</p> <p>484a. Same—Where different tracts are included.</p> <p>484b. Same—Where property partly in another state.</p> <p>484c. Same—In sale under power.</p> <p>484d. Same—Indiana statute.</p> <p>486. Determining how much of premises to be sold.</p> <p>487. Sale to be made so as to protect subsequent liens and equities.</p> | <p>§ 488. Sale in parcels—When matter of right.</p> <p>489. Selling in parcels when premises described in one piece.</p> <p>491. Discretion of officer as to selling in parcels.</p> <p>495. Sale of portion of premises for part of debt due—Failure to pay subsequent installments.</p> <p>498. Where proceedings stayed by payment—Subsequent default.</p> |
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§ 484. Sale in parcels—Discretion of court.—On the foreclosure of a mortgage a sale of the whole title is not invariably essential in equity to foreclose a right of redemption.<sup>1</sup> And the mortgaged premises may be sold in one piece or in parcels, as the court may think most likely to realize the most money. Thus, in an action to foreclose a mortgage covering several adjoining tracts of land, the court may provide in the judgment and decree of sale for a sale of the premises in one parcel.<sup>2</sup> And where lots of land are so situated as naturally to constitute one farm, one of which is partly fenced and cultivated, while the other is not, they may be sold together in one parcel on foreclosure sale in those cases where it is not shown that they were not in fact used as one farm.<sup>3</sup> In all cases where, in the

<sup>1</sup> *Hanna v. Davis*, 112 Mo. 599; 20 S. W. Rep. 686. See: *Carpenter v. Russell*, 129 Ind. 571; s. c. 29 N. E. Rep. 36; *Nex v. Williams*, 110 Ind. 2340; s. c. 11 N. E. Rep. 36; 8 West. Rep. 872.

<sup>2</sup> *Hopkins v. Wiard*, 72 Cal. 259; s. c. 13 Pac. Rep. 687.

<sup>3</sup> *Harris v. Creveling*, 80 Mich. 249; s. c. 45 N. W. Rep. 85.



sale of adjoining lots, it appears that the premises have been held as an entire property and under one ownership, and that to sever them would be destructive of the value of both, the court should order the lots sold together.<sup>1</sup> And the United States circuit court for the northern district of Illinois, in the case of the Central Trust Company v. United States Rolling Stock Company,<sup>2</sup> say that a decree foreclosing a mortgage properly provides for the sale of the real estate upon which the plant of a manufacturing company is located as an entirety, where to cut it up into parcels would probably produce a less price than if it is sold as a whole.

The supreme court of California, in the case of Bank of Sonoma County v. Charles,<sup>3</sup> say that a foreclosure decree following the provision of the mortgage, that the lands embraced therein be sold in one large parcel and in several other smaller parcels is not erroneous. But in all cases where the order of the court is that the mortgaged property be sold in certain specified parcels, a sale by the sheriff as an entirety is invalid,<sup>4</sup> and is ground for setting aside the sale on proper application.<sup>5</sup>

It has been held that a foreclosure sale of land by first offering for sale the rents and profits of each parcel, and, on receiving no bid, offering the fee simple of the separate parcels in their respective order, and, finally, by offering and selling the fee simple of the whole tract, is valid although the rents and profits of all the tracts together were not offered before the fee was offered.<sup>6</sup>

§ 484a. Same—Where different tracts are included.—It is held that in those cases where a mortgage embracing

<sup>1</sup> *Pepper v. Shepherd*, 4 Mack. (D. C.), 269; s. c. 1 Cent. Rep. 87.

<sup>2</sup> 56 Fed. Rep. 5.

<sup>3</sup> 86 Cal. 322; s. c. 24 Pac. Rep. 1019.

<sup>4</sup> *Meriwether v. Craig*, 118 Ind. 301; s. c. 20 N. E. Rep. 769.

<sup>5</sup> Sale of mortgaged premises en masse does not render the sale

void; at most, it is but ground for setting it aside upon proper application. *Bozartle v. Largent*, 128 Ill. 95; s. c. 21 N. E. Rep. 218.

<sup>6</sup> *Carpenter v. Russell*, 129 Ind. 571; s. c. 29 N. E. Rep. 36. See: *Nix v. Williams*, 110 Ind. 234; s. c. 11 N. E. Rep. 36; 8 West. Rep. 872.



two tracts of land, the owner of only one of which is the real debtor, will, in the first instance, be foreclosed only as against the land belonging to the real debtor, and not against the surety, unless the real debtor's land proves insufficient to pay the debt and costs.<sup>1</sup> And where a surviving partner who, for a debt incurred for the benefit of the firm business, has given a mortgage, valid and superior to the claims of the estate, upon the firm property, and has also mortgaged his own property to secure the same debt, he is entitled, as against the estate, to have the mortgage debt satisfied from the mortgaged firm property before his individual property mortgaged at the same time.<sup>2</sup>

It is thought that in all those instances where an instrument constitutes in effect several separate and distinct mortgages upon several lots, given to secure several separate and distinct sums of money, but for convenience all are consolidated in one writing, a sale in foreclosure by advertisement of all the lots together as one tract, for a gross sum, is unauthorized and void.<sup>3</sup>

The supreme court of the United States have said that a plantation, and the personal property belonging thereto, may be sold in a lump under a mortgage including both; and the sale may be at the seat of justice, unless the debtor seasonably requires the sale to be on the plantation.<sup>4</sup>

§ 484b. Same—Where property partly in another State.—The supreme court of New York, in the case of the Farmers Loan and Trust Company v. Bankers and Merchants Telegraph Company,<sup>5</sup> hold that where in the decree foreclosing a mortgage upon property situated both within and without the State, it is found that the property should in no case be sold or disposed of except as an entirety, the court should not direct a separate sale of the property

<sup>1</sup> Speakman v. Oaks, 97 Ala. 503; s. c. 11 So. Rep. 836.

<sup>2</sup> Bell v. Hopworth, 134 N. Y. 442; s. c. 31 N. E. Rep. 918; 47 N. Y. S. R. 807.

<sup>3</sup> Hull v. King, 38 Minn., 349; s. c. 37 N. W. Rep. 792.

<sup>4</sup> Stockmeyer v. Tobin, 139 U. S. 176; bk. 35 L. ed. 123; s. c. 11 Sup. Ct. Rep. 504.

As to sale of mortgaged premises at seat of justice, or the door of the court house, see: *Ante*, § 479a.

<sup>5</sup> 44 Hun (N. Y.) 406.

situated within the State, it not appearing that it was impossible for the mortgagee to enforce his rights by a method not entailing such great disaster as would result from such sale in separate parcels.

§ 484c. *Same*.—In sale under power.—Where a sale is made by a trustee under a trust deed authorizing him to “sell and dispose of said premises,” he has a discretion to sell the land entire or in parcels; and his failure to advertise the sale as in parcels will not make it invalid.<sup>1</sup> It is thought that such a sale under a power, in gross as one parcel, of several separate and distinct tracts of land, is not void, but only voidable for good cause shown, such as, that the sale in this manner was the result of fraud, or that prejudice resulted therefrom to the mortgagor or owner of the equity of redemption.<sup>2</sup> It has been held that land may be sold in parcels to separate purchasers at one sale, under a power in the mortgage, if the sale is made in such a manner as to obtain the most money for the land.<sup>3</sup>

§ 484d. *Same*—Indiana statute.—It has been said that under the Indiana statute<sup>4</sup> the sale of a portion of premises, mortgaged in behalf of the school fund, made by an auditor, is invalid, unless the land is taken out of the north-westerly corner of the tract mortgaged, in a form as nearly square as practicable.<sup>5</sup>

§ 486. *Determining how much of premises to be sold*.—The general rule is that in foreclosures in equity, sales may be directed in such manner and quantity as in the discretion of the court will secure the highest price;<sup>6</sup> but it is well settled that a decree on foreclosure of a mortgage can not deprive the mortgagee of the right to the sale of the whole premises.<sup>7</sup>

<sup>1</sup> Loveland v. Clark, 11 Colo. 265; s. c. 18 Pac. Rep. 544.

<sup>2</sup> Willard v. Finnegan, 42 Minn. 476 (1890); s. c. 44 N. W. Rep. 985, 8 L. R. A. 50.

<sup>3</sup> Holmes v. Turners Falls Lumber Co., 150 Mass. 535 (1890); s. c. 23 N. E. Rep. 305; 6 L. R. A. 283.

<sup>4</sup> 1 Ind. Rev. Stat., 1881, § 4391.

<sup>5</sup> Haynes v. Cox, 118 Ind. 184; s. c. 20 N. E. Rep. 758.

<sup>6</sup> Macomb v. Prentiss, 57 Mich. 225; s. c. 23 N. W. Rep. 788.

<sup>7</sup> Baker v. Marsh, 1 N. D. 20; s. c. 44 N. W. Rep. 662.

A sale of the entire property is proper in the case of deeds of trust, where all the incumbrances are due, and where the plaintiff has a first lien on some of the property sought to be sold and a second lien on the other property, and where all the incumbrancers are parties to the suit.<sup>1</sup> And on the application of a junior incumbrancer a court of equity will provide for the sale of the entire incumbered property, if the circumstances of the case show that the interests of the mortgagor and of the incumbrancers require the sale.<sup>2</sup>

A statutory prohibition<sup>3</sup> against selling more lots than are necessary, is absolute in a proceeding to foreclose a mortgage by advertisement.<sup>4</sup>

It has been held that on the foreclosure of a mortgage, subject to which is a right of way over a ten-foot strip of the land, title to which was acquired on the foreclosure of a second mortgage, the title to the rest of the lot, subject to the mortgage, having been acquired by another person on the foreclosure of a still later mortgage, which did not cover the ten-foot strip, it is proper to order the part of the land other than the ten-foot strip to be first sold.<sup>5</sup>

Where the answer in a foreclosure suit puts in issue the validity of the mortgage as executed by the husband alone, and sets up the defense that the property is exempt as a homestead, a decree will not be granted for the sale of so much of the property as exceeds in value the amount exempted by statute, unless the value thereof is alleged by plaintiff, or put in issue by proper pleadings.<sup>6</sup>

§ 487. Sale to be made so as to protect subsequent liens and equities.—While it is true that in a mortgage foreclosure the sale of the mortgaged premises is not for the benefit of the complainant alone, but of all the parties

<sup>1</sup> *Shepherd v. Pepper*, 133 U. S. 626; bk. 33 L. ed. 706; s. c. 10 Sup. Ct. Rep. 438.

<sup>2</sup> *Id.*

<sup>3</sup> As N. Y. Code Civ. Proc., § 2393.

<sup>4</sup> *Hemmer v. Hustice*, 51 Hun (N. Y.) 457; s. c. 21 N. Y. S. R.

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<sup>5</sup> *Case v. Mannis*, 33 N. Y. S. R. 44; s. c. 11 N. Y. Supp. 243; 19 Civ. Pro. Rep. 296; aff'd. in 123 N. Y. 661, mem.

<sup>6</sup> *Whitlock v. Gosson*, 35 Neb. 829; s. c. 53 N. W. Rep. 980.

who are before the court, and will be made, so far as practicable, so as to protect subsequent liens and equities; yet a judgment creditor, pending his appeal from an order setting aside the judgment, cannot maintain a suit in equity to compel the mortgagee to sell that portion of the mortgaged property to which he can not resort, before proceeding to sell the remainder.<sup>1</sup>

**§ 488. Sale in parcels—Where matter of right.**—The plaintiff in a mortgage foreclosure is entitled to the sale of a sufficient amount of the mortgaged premises to pay his claim and the costs of the action, and no more, where the property is susceptible of being divided; and where the property mortgaged consists of several distinct tracts or parcels, they should be sold separately;<sup>2</sup> and

<sup>1</sup> *Burgess v. Hitt* (Mo. App. 1886), 4 West Rep. 262.

<sup>2</sup> Under California Code of Civil Procedure, § 684, the defendants in a mortgage foreclosure may require separate lots or parcels to be sold separately, and specify the order of sale. *Ontario Land & Imp. Co. v. Bedford*, 90 Cal. 181; s. c. 27 Pac. Rep. 39.

Illinois Revised Statutes, c. 77, § 12, requiring that when real or personal property susceptible of division is taken in execution it shall be sold in separate tracts, lots, or articles, does not apply to mortgage foreclosures. *Dates v. Winstanley*, 53 Ill. App 623.

Under Howell's Michigan Statutes, § 5803, where the mortgagee has, by releasing a part of the mortgaged premises, severed the remainder into separate and distinct parcels, the parcels must be sold separately. *Keyes v. Sherwood*, 71 Mich. 516; s. c. 39 N. W. Rep. 740.

Under Washington Code of Procedure, §§ 501 and 630, which provide for enforcing the decree by execution, and, as to sales under exe-

cution, that a portion claimed by a third person may be sold separately, a sale in parcels may be demanded on foreclosure, by a defendant who has purchased a portion of the premises subject to the mortgage. *Solicitors' Loan & T. Co. v. Washington & I. R. Co.*, 11 Wash. 684; s. c. 40 Pac. Rep. 344.

Under West Virginia Code, 1873, c. 113, § 6, providing that when default shall have been made in payment of the debt or any part thereof, the trustee shall sell the property conveyed by the deed, or so much thereof as may be necessary, a tract of land worth \$25,000, subject to a trust deed for \$12,000, should be subdivided and sold in parcels, so that no more may be sold than is necessary to pay the debt, where it is capable of subdivision, although the deed simply directs the trustee to sell the property conveyed. *Morriss v. Virginia State Ins.*, 90 Va. 370; s. c. 7 S. E. Rep. 843.

The franchise and property of a water supply company will be sold with the plant, where the sale of the

a sale of several lots or tracts in one parcel, where the decree does not direct that they be so sold, will be set aside where it is shown that the lots would have produced more had they been sold separately.<sup>1</sup> The general rule, however, is that such sales are not void, but merely voidable.<sup>2</sup> Yet it is said in the case of *Skaggs v. Kincaid*<sup>3</sup> that a decree of foreclosure of a mortgage on several tracts of land, the equities of redemption of which are owned by different persons, is materially defective where it requires the premises to be sold *en masse*, notwithstanding a clause in the trust deed authorizing the trustee in his discretion to sell in such manner, where the owners of the equity of redemption of some of the tracts have died so that the sale cannot be made under the Illinois statute<sup>4</sup> by virtue of the power of sale in such trust deed. The supreme court of Illinois, in the case of *Brown v. McKay*,<sup>5</sup> say that an indebtedness secured by a trust deed will not be so apportioned upon foreclosure thereof that an equitable part of it will fall upon

latter becomes necessary under a mortgage, on the ground that public necessity requires the two to be sold together, notwithstanding an agreement that the machinery shall not be a fixture. *McNeal, Pipe & F. Co. v. Woltman*, 114 N. C. 178; s. c. 19 S. E. Rep. 109.

<sup>1</sup> See: *Larkin v. Brouty*, 15 N. Y. Supp. 509; s. c. 39 N. Y. S. R. 879.

**Under Minnesota Statute** a sale under a power contained in a mortgage of twenty-five lots, each for a separate sum, of five of such lots, upon a notice stating the amount due on the debt and for taxes paid in gross, instead of the separate sum due on each lot, though each lot is sold separately for the exact sum due upon it,—is unauthorized and invalid, but is cured by Minnesota General Laws, 1883, c. 112, § 1, relieving from such defects. *Bitzer v. Campbell*, 47 Minn. 221; s. c. 49 N. W. Rep. 691.

**Under Hill's Washington Code, Vol. II, p. 501**, providing that lots may be sold separately or together as is likely to bring the highest price, a sale of lands consisting of a number of city lots, under a judgment of foreclosure, will not be set aside because the lots were not sold separately, in the absence of a showing that a larger sum would have been realized if the lots had been so sold. *Feek v. Brewer*, 11 Wash. 264; s. c. 39 Pac. Rep. 655.

<sup>2</sup> See: *Ryder v. Hulett*, 44 Minn. 353; s. c. 46 N. W. Rep. 559; *Guarantee Trust & S. D. Co. v. Jenkins*, 40 N. J. Eq. 451; s. c. 2 Atl. Rep. 13; 2 Cent. Rep. 173.

<sup>3</sup> 48 Ill. App. 608.

<sup>4</sup> Ill. Rev. Stat. c. 95, § 13.

<sup>5</sup> 151 Ill. 315; s. c. 37 N. E. Rep. 1037, aff'g 51 Ill. App. 295.



an undivided one fifth of the land subsequently alienated, the purchaser taking subject to the trust deed and agreeing to pay a *pro rata* share of the incumbrance, where it does not appear that the undivided four-fifths, if sold separately, would bring sufficient to satisfy the four-fifths of the indebtedness and costs remaining after the payment of one-fifth by the purchaser thereof, or that it would bring as much proportionately when thus sold as it would if the parcels were sold together.

It has been held that a second mortgagee, who has released the timber on the land from the lien of the mortgage, and subsequently taken an assignment of a judgment on the first mortgage, will not be permitted to sell the land and the timber under such judgment; but a sale of the timber will be ordered only in case the proceeds of the land are insufficient to satisfy the first mortgage.<sup>1</sup> And a person having a lien on one of several parcels of mortgaged land conveyed by the mortgagor cannot require that a parcel prior in order of alienation be first sold under the mortgage, upon offering to pay the whole amount of the mortgage debt for that parcel alone.<sup>2</sup>

An inchoate right of dower entitles the wife to have the land sold under a mortgage in separate parcels, instead of by the entirety, where that is necessary to protect her interests; and such right is not affected, although rendered less valuable, by the fact that she is an old woman.<sup>3</sup> And it has been held that a woman who has received from her husband a conveyance of a part of his land, which is all subject to a mortgage, is not prevented from insisting on the right to have the other part sold on the mortgage by the fact that she has subsequently united with her husband in another mortgage of that part.<sup>4</sup>

### § 489. Selling in parcels where premises described in

<sup>1</sup> Pratt v. Waterhouse, 153 Pa. St. 45; s. c. 27 Atl. Rep. 855; 24 Pitts. L. J., N. S. 169.

<sup>2</sup> Crosby v. Farmers Bank, 107 Mo. 436; s. c. 17 S. W. Rep. 1004.

<sup>3</sup> Crosby v. Farmers' Bank, 107 Mo. 436; s. c. 17 S. W. Rep. 1004.

<sup>4</sup> Case Threshing Machine Co. v. Mitchell, 74 Mich. 689; s. c. 42 N. W. Rep. 151.



one piece.—Where mortgaged property consists of one block of land with a building adapted to one purpose it is properly sold as a whole under the foreclosure of the mortgage, although at a prior time the property had been split up in separate parcels, having upon it separate buildings.<sup>1</sup>

In the case of *Abbott v. Peck*,<sup>2</sup> after a mortgage of land by government description, the mortgagor platted it into lots and blocks, the mortgagee joining in the plat; and afterwards the mortgagee foreclosed and sold the land in separate blocks. The court held he was not required to sell in lots or half-lots. It is said by the supreme court of Michigan, in *Gage v. Sanborn*,<sup>3</sup> that a sale of land in one parcel under a mortgage foreclosure by advertisement is not invalid on the ground that different parcels were sold together, where the mortgage describes the premises as "lots 3 and 10 and the north half of lots 2 and 11," as it does not appear therefrom that all the land was not used as one parcel.

§ 491. Discretion of officer as to selling in parcels.—There is vested in the officer making the sale a certain discretion as to whether the sale shall be made in parcels or as a whole. Thus it is said that where the sheriff has offered the rents and profits of the lots levied on for sale and then the lots, separately, he is justified in offering all the lots together,<sup>4</sup> The supreme court of Indiana, in *Shannon v. Hay*,<sup>5</sup> say that where a tract of land consisting of three "full forties" and a "fractional forty," included in a mortgage to the State of Indiana for the use of a congressional township, was therein described as a single tract or lot, the auditor of the county is not required by Indiana Revised Statutes,<sup>6</sup> to offer for sale, to pay the debt, any certain or specific less quantity or parcel of the whole tract. Although the land is susceptible of sale in separate parcels,

<sup>1</sup> *Coudert v. De Logerot*, 62 N. Y. S. R. 26; s. c. 30 N. Y. Supp. 114.

<sup>2</sup> 35 Minn. 499; s. c. 29 N. W. Rep. 194.

<sup>3</sup> 64 N. W. Rep. 32.

<sup>4</sup> *Nix v. Williams*, 110 Ind. 234;

s. c. 11 N. E. Rep. 36; 8 West. Rep. 872. See: *Carpenter v. Russell*, 129 Ind. 571; s. c. 29 N. E. Rep. 36.

<sup>5</sup> 106 Ind. 589; s. c. 7 N. E. Rep. 376; 4 West. Rep. 718.

<sup>6</sup> Ind. Rev. Stat., 1881, § 4392.

it is sufficient to inquire "who will take a less quantity than the whole and pay the amount due on such note and mortgage," and, no bid being received, to sell the entire tract.

§ 495. **Sale of portion of premises for part of debt due—Failure to pay subsequent installments.**—Under a statute<sup>1</sup> providing that, where a sale has been made under a mortgage for the amount of a debt then due, more of the property may be ordered to be sold as other parts become due, the creditor does not lose his right to a sale because he has not sold any of the property till the whole debt has become due.<sup>2</sup> The supreme court of California, in the case of *National Bank v. Godfrey*,<sup>3</sup> say that, although the proper practice to procure a modification of a decree for the sale of sufficient of the mortgaged property to pay the amount then due, by ordering a payment of other sums which have become due, is by a motion, yet where the plaintiff has filed what he termed an amended petition for that purpose before any sale has been made, the petition may be properly treated as such a motion as the California Code of Civil Procedure authorizes.

§ 498. **Where proceedings stayed by payment.—Subsequent default.**—The general rule is that the acceptance by a mortgagee of money to be applied on the mortgage debt, after foreclosure, waives the foreclosure and restores the mortgage.<sup>4</sup> And the fact of payment after the bill has been filed is properly set up by answer, and not by cross-bill.<sup>5</sup>

The tender to a mortgagee of the principal, interest, and costs after maturity of the debt, and before any sale or foreclosure proceedings have been begun, is available on his refusal of the tender only to stop interest and save subsequent costs, where the money is not deposited or kept ready for the mortgagee in case of demand, or to be tendered

<sup>1</sup> As Cal. Code Civ. Proc., § 728.

<sup>2</sup> *National Bank v. Godfrey*, 77 Cal. 612; s. c. 20 Pac. Rep. 142.

<sup>3</sup> 77 Cal. 612; s. c. 20 Pac. Rep. 142.

<sup>4</sup> *Scott v. Childs*, 64 N. H. 566; s. c. 15 Atl. Rep. 206; 6 N. Eng. Rep. 913.

<sup>5</sup> *Kaelbe v. Goebbel* (N. J. Ch. 1886), 4 Cent. Rep. 242.

at the trial.<sup>1</sup> And the tender of unpaid interest six months after the maturity of a note and the right of foreclosure of a mortgage has accrued under an option to consider the whole sum due will not defeat the foreclosure.<sup>2</sup>

<sup>1</sup> *Parker v. Beasley*, 116 N. C. 1; s. c. 21 S. E. Rep. 955.

<sup>2</sup> *Swearingen v. Lahner*, 93 Iowa —; s. c. 61 N. W. Rep. 431; s. c. 26 L. R. A. 765.

In this case the interest became due on the notes March 1st, and was not paid or tendered until the following September 23d, when it was refused by the plaintiff, who commenced action to foreclose on October 14th, without further notice. In the course of the opinion the court say: "Some courts have held that contracts in notes and mortgages given to secure them are separate and independent, and each contract must be construed with reference to its own particular terms. *White v. Miller*, 52 Minn. 367; s. c. 54 N. W. Rep. 736; 19 L. R. A. 673; *McClellan v. Bishop*, 42 Ohio St. 113; *Indiana & I. Cent. R. Co. v. Sprague*, 103 U. S. 756; bk. 26 L. ed. 554. Should we adopt this rule, then it is clear from the authorities cited that the stipulation in the mortgage itself authorizes the

remedy sought to be obtained in this case. But the decided weight of authority in this country is that a note and mortgage executed at the same time and as one transaction are to be construed together, and, so far as possible, construed as one instrument, See: *Noell v. Gaines*, 68 Mo. 649; *Chambers v. Marks*, 93 Ala. 412; s. c. 9 So. Rep. 74; *Wheeler & Wilson Mfg. Co. v. Howard*, 28 Fed. Rep. 741; *Schoonmaker v. Taylor*, 14 Wis. 313; *Stanclift v. Norton*, 11 Kan. 218; *Mallory v. West Shore & H. R. Co.*, 3 Jones & S. (N. Y.) 174; *Lantry v. French*, 33 Neb. 524; s. c. 50 N. W. Rep. 679. This rule is adopted by this court in *Clayton v. Whitaker*, 68 Iowa 412; s. c. 27 N. W. Rep. 296; *Sloat v. Bean*, 47 Iowa 60; *Dobbins v. Parker*, 46 Iowa 357; *Dean v. Ridgeway*, 82 Iowa 575; s. c. 48 N. W. Rep. 923; *German Bank v. Griffin*, 54 Iowa 749; s. c. 6 N. W. Rep. 155; *Cramer v. Kebman*, 9 Iowa 114."

## CHAPTER XXIV.

### SALE IN INVERSE ORDER OF ALIENATION.

GENERAL RULE—DETERMINING ORDER OF SALE—COURT DIRECTING ORDER—  
EQUITABLE RIGHTS BETWEEN SUBSEQUENT GRANTEES AND LIENORS.

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|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>§ 499. Rule for selling in inverse order of alienation.</p> <p>499a. Same—Where the mortgaged land has been platted.</p> <p>499b. Same—Where mortgage taken with notice of equities.</p> <p>499c. Same—In case of subsequent mortgagee.</p> | <p>§ 499d. Same—In case of lessee not a party.</p> <p>511. Contribution according to value — Valuation, when made.</p> <p>514. Rule for order of sale where the mortgage covers homestead and other lands.</p> |
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**§ 499. Rule for selling in inverse order of alienation.**—It is a well established rule in mortgage foreclosure sales that where a part of a tract of land subject to a lien is conveyed absolutely, the residue is primarily liable for the whole debt; and where there are successive conveyances, the land is liable in the inverse order of the conveyance.<sup>1</sup> The same rule applies in those cases where there has been successive

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<sup>1</sup> *Miller v. Holland*, 84 Va. 652; s. c. 5 S. E. Rep. 701; *Vogel v. Brown*, 120 Ill. 338 (1887); s. c. 11 N. E. Rep. 327; 12 *Id.* 252; 8 West Rep. 648; *Boone v. Clark*, 129 Ill. 466; s. c. 21 N. E. Rep. 850; *Millsaps v. Bond*, 64 Miss. 453; s. c. 1 So. Rep. 506; *Mahagan v. Mead*, 63 N. H. 570; s. c. 3 Atl. Rep. 919; 2 N. Eng. Rep. 252; *New York Mut. L. Ins. Co. v. Dowden* (N. J. Ch.), 2 Cent. Rep. 221; *Thomas v. Moravia Foundry & Machine Co.*, 43 Hun (N. Y.) 487. See: *Harrison v. Guerin*, 27 N. J. Eq. (12 C. E. Gr.) 219; *Mount v. Potts*, 23 N. J. Eq. (8 C. E. Gr.) 188; *Weatherby v. Slack*, 16 N. J. Eq. (1 C. E. Gr.) 491; *Shannon v. Marselis*, 1 N. J. Eq. (Saxt.) 413. (1288)

**A different rule as to mortgages** has been said to prevail, citing: *Pan-coast v. Duval*, 26 N. J. Eq. (11 C. E. Gr.) 445; *Mutual Life Ins. Co. v. Boughrum*, 24 N. J. Eq. (9 C. E. Gr.) 44; *Gilbert v. Golpin*, 11 N. J. Eq. (3 Stock.) 445; *Mickle v. Rombo*, 1 N. J. Eq. (Saxt.) 501; *Shannon v. Marselis*, 1 N. J. Eq. (Saxt.) 413.

**A parcel of a mortgaged tract of land, conveyed by the mortgagor after the execution of the mortgage, will be sold under a decree of foreclosure of such mortgage, where the proceeds of a sale of the balance of the tract are insufficient to satisfy all the mortgage liens covering the entire tract, the satisfaction of which is decreed in the foreclosure**

conveyances with warranty by the mortgagor's grantee.<sup>1</sup> But it is thought that an omission to sell mortgaged premises in the inverse order of alienation is not such an illegality as affects the jurisdiction or vitiates the title acquired on the sale.<sup>2</sup>

§ 499a. Same—Where the mortgaged land has been platted.—In those cases where the mortgaged land has been platted into streets and lots and a portion thereof conveyed subsequent to the execution of a mortgage on the premises, upon a foreclosure of the mortgage purchasers by the plat, as well as junior incumbrancers, having liens upon portions of the platted premises, cannot insist that the portions embraced in the platted streets and alleys donated to the public shall be treated as premises released, and their value credited upon the mortgage debt.<sup>3</sup>

§ 499b. Same—Where mortgage taken with notice of equities.—Where an assignee of a mortgage takes it with notice of the existence of circumstances which would render it inequitable for the lands to be sold in the inverse order of alienation on the foreclosure of the prior mortgage, he has no right to insist upon a sale in that order.<sup>4</sup>

suit, provided such parcel is covered by any of the incumbrances embraced within such decree. *Wilmer v. Huntington* (Ky. 1894), 25 S. W. Rep. 602; s. c. 16 Ky. L. Rep. 4.

Where there is a junior mortgage.—On the foreclosure of a mortgage upon lands, a part of which are covered by a junior mortgage, the part not included therein should be sold first. *Millsaps v. Bond*, 64 Miss. 453; s. c. 1 So. Rep. 506.

Successive conveyances.—Where L first executed a mortgage to complainant; then executed another mortgage to V; conveyed a portion of the land to D, and remainder to W. On foreclosure of complainant's mortgage, the court held that the lands must be

sold in the following order: Lands conveyed to W, not including portion mortgaged to V; portion mortgaged to V; portion conveyed to D. *New York Mut. L. Ins. Co. v. Dowden* (N. J. Ch.), 2 Cent. Rep. 221.

<sup>1</sup> *Mahagan v. Mead*, 63 N. H. 570; s. c. 3 Atl. Rep. 919; 2 N. Eng. Rep. 252. See: *New York Mut. L. Ins. Co. v. Dowden* (N. J. Ch.), 2 Cent. Rep. 221.

<sup>2</sup> *Jenks v. Quinn*, 137 N. Y. 223; s. c. 33 N. E. Rep. 376; 50 N. Y. S. R. 795.

<sup>3</sup> *Boone v. Clark*, 129 Ill. 466; s. c. 21 N. E. Rep. 850.

<sup>4</sup> *Boone v. Clark*, 129 Ill. 466; s. c. 21 N. E. Rep. 850.

§ 499c. Same—In case of subsequent mortgagee.—It is thought the rule in equity, that where a prior mortgagee holds a lien upon lands, and a subsequent mortgagee holds a mortgage upon a portion of the same lands, on foreclosure by the prior mortgagee, he should first offer for sale that part not covered by the junior mortgage, has no application to cases where the lands omitted in the previous mortgage “are excluded from all remedies of creditors in all courts.”<sup>1</sup> In those cases where the holder of a mortgage which was taken expressly subject to another mortgage on the same lands has no right, on a foreclosure of the latter, to insist on the lands being sold in the inverse order of alienation.<sup>2</sup> And a mortgagee who has acquired from the grantee of the mortgagor the title to part of the mortgaged premises is not entitled, on a foreclosure of the mortgage, to a judgment for the sale of the other portion first, for the payment of his mortgage.<sup>3</sup>

§ 499d. Same—In case of lessee not a party.—In a case where the lessee of a part of the mortgaged premises is not made a party to the foreclosure, his right may properly be protected by the court by selling first the portions of the premises not embraced in the lease.<sup>4</sup>

§ 511. Contribution according to value—Valuation, when made.—The rule is well established that when a vendor sells part of a tract subject to a mortgage which covers the entire tract, the vendor and purchaser stand on the same level, and must contribute in proportion to their several interests.<sup>5</sup> And the fact that a part of premises mortgaged is sold subject to a proportionate part of the mortgage debt will not be sufficient to prevent the operation of the rule requiring contribution in inverse order of conveyance as to parts of such parcel which are

<sup>1</sup> *Armitage v. Toll*, 64 Mich. 412; s. c. *sub. nom.* *Armitage v. Davenport*, 31 N. W. Rep. 408; 7 West Rep. 653.

<sup>2</sup> *Boone v. Clark*, 129 Ill. 466; s. c. 21 N. E. Rep. 850.

<sup>3</sup> *Sanford v. Van Arsdall*, 53 Hun (N. Y.) 70; s. c. 5 N. Y. S. R. 433; 6 N. Y. Supp. 494.

<sup>4</sup> *Collins v. Cunningham*, 21 Can. S. C. 139.

<sup>5</sup> *Aderholdt v. Henry*, 87 Ala. 415; s. c. 6 So. Rep. 625; 6 L. R. A. 451.



sold to subsequent purchaser.<sup>1</sup> And those cases where there is no specific agreement as to the proportion of the mortgage debt which each part of mortgaged premises is to bear, where a portion is sold subject to a proportionate part of the incumbrance, contribution must be made according to the relative value of each part.<sup>2</sup> In the case of *Tarbull v. Durant*,<sup>3</sup> where the equitable owner of land mortgaged by a deed absolute in form to a creditor had sold a part of it, a note and mortgage therefor being taken by the creditor as a substitute for the legal title to that part, and assigned the note, subject to the creditor's claim, on foreclosure by such creditor of all the land, such assignee, and one who, by a prior attachment, has acquired an interest in the other part of the land, must contribute proportionally.

§ 514. Rule for order of sale where mortgage covers homestead and other lands.—It was held, by a divided court, in the case of *Armitage v. Toll*,<sup>4</sup> that in foreclosing a mortgage executed by a husband and his wife upon several parcels of land, including his homestead, the homestead can be sold only to pay the deficiency remaining after sale of all the other property mortgaged, and that a second mortgagee has no right to have the liability of the homestead increased by requiring it to be first sold to satisfy the mortgage debt.

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<sup>1</sup> *Moore v. Shurtleff*, 128 Ill. 370; s. c. 21 N. E. Rep. 775.

<sup>2</sup> *Moore v. Shurtleff*, 128 Ill. 370; s. c. 21 N. E. Rep. 775.

<sup>3</sup> 61 Vt. 516; s. c. 17 Atl. Rep. 44.

<sup>4</sup> 64 Mich. 412; s. c. *sub nom.* *Armitage v. Davenport*, 31 N. W. Rep. 408; 7 West. Rep. 653.

## CHAPTER XXV.

### CONDUCT OF SALE.

PERSONAL ATTENDANCE OF REFEREE—DISCRETIONARY POWERS OF SALE—  
ADJOURNMENT—WHO MAY FORECLOSE—REPORT OF SALE  
BY REFEREE—CONFIRMATION THEREOF.

§ 517. Postponement and adjournment of sale.	§ 521. Purchase by mortgagee.
518. Publishing notice of adjournment.	522. Memorandum of sale.
520. Who may purchase at foreclosure sale.	523. Report of officer making sale.
	525. Confirmation of referee's report.

§ 517. Postponement and adjournment of sale.—The statutes of the various states provide for the postponement and adjournment of sales under decree in mortgage foreclosures upon stated terms and conditions. Where the defendant desires an adjournment of the sale, he may properly be required to pay the costs of re-advertising as a condition of the adjournment, but he cannot properly be required to pay money as a condition for such adjournment.<sup>1</sup> It is well established that trustees under a trust deed have, in their sound discretion, the right, for good cause, to adjourn a sale to another day, especially where the trust deed confers the power to repeat and postpone from time to time as they may deem expedient.<sup>2</sup> But in the absence of any statute on the subject, a trustee having a naked power to sell under a trust deed, has no power to adjourn a sale before the day of sale by simply changing the time for the sale in the notice published.<sup>3</sup>

§ 518. Publishing notice of adjournment.—Notice of the adjournment of a sale of mortgaged lands, whether

<sup>1</sup> Holland Trust Company v. Hogan, 17 N. Y. Supp. 919; s. c. 44 N. Y. S. R. 577.

<sup>2</sup> Crutchfield v. Hewett, 2 App. (1292)

Cas. D. C. 373; s. c. 22 Wash. L. Rep. 127.

<sup>3</sup> Wolff v. Ward, 104 Mo. 127; s. c. 16 S. W. Rep. 161.

made under decree of court or under a power in the mortgage or trust deed, must be properly given; but a notice of postponement of a sale under a trust deed need not be advertised for the same length of time required for the original notice.<sup>1</sup> Neither is it necessary to add the names of the trustees in the trust deed to the notice of postponement of the sale added to the original notice, which, with the names of the trustees thereto, is republished; the name of the authorized auctioneer being held to be sufficient.<sup>2</sup>

In a case where notice of one of the adjournments of a foreclosure sale was not published until the day of the sale, when all of the adjournments were published, and the referee's report of the sale was duly served on all the parties and confirmed, the irregularity was held to be one which the parties are competent to waive; and if none of the parties make any complaint, the objection is not available to impeach the title to the property.<sup>3</sup> The supreme court of Illinois, in the case of *Ritchie v. Judd*,<sup>4</sup> say that a mortgagor is not prejudiced by a re-advertisement of a sale under the mortgage, upon a discovery of an error in the first notices, in the absence of evidence of a bad motive in so doing.

§ 520. Who may purchase at foreclosure sale.—Any one who is competent to bid at a sale on mortgage foreclosure, may become the purchaser at such sale, either directly or indirectly.<sup>5</sup>

THE ATTORNEY of the plaintiff may purchase the premises for his own benefit, where his conduct is fair and honest;<sup>6</sup> but it has been said that the attorneys for a

<sup>1</sup> *Crutchfield v. Hewett*, 2 App. Cas. D. C. 373; s. c. 22 Wash. L. Rep. 127.

<sup>2</sup> *Id.*

<sup>3</sup> *Bechstein v. Schultz*, 120 N. Y. 163; s. c. 24 N. E. Rep. 333, 30 N. Y. S. R. 576.

<sup>4</sup> 137 Ill. 453; s. c. 27 N. E. Rep. 632.

<sup>5</sup> Where the ostensible purchaser at

a trustee's sale under a trust deed directs the deed to be made to another, a stranger to the sale, cannot, in the absence of fraud, complain that the real purchaser did not make his bid in person. *Jones v. Hagler*, 95 Ala. 529; s. c. 10 So. Rep. 345.

<sup>6</sup> *Holland Trust Co. v. Hogan*, 17 N. Y. Supp. 919; s. c. 44 N. Y. S. R. 577.

plaintiff in an action to foreclose a mortgage made to a trustee for the benefit of the bondholders of a street railroad company, being also the attorneys for the receiver of such company, are disqualified from purchasing the mortgaged property for their own benefit when sold by the receiver under the decree of foreclosure, with the consent of the trustee but without that of the bondholders.<sup>1</sup>

THE BENEFICIARIES under a trust deed may be the purchasers at a sale made thereunder. In those cases where the beneficiary bids off the property, the trustee should allow a reasonable time to appear before the court and give security; and if this is not done the trustee may properly make a deed, instead of giving a certificate of sale.<sup>2</sup> And in enforcing a trust deed against a portion of the land as to which the trustee has made an invalid release, the land, on purchase by the beneficiaries, must be charged with the amount paid to them, through the trustee, upon such release, in preference to the amount due to them under the trust deed.<sup>3</sup>

A CREDITOR OF THE MORTGAGOR may purchase at the foreclosure sale, for, it is said, the fiduciary relation of a creditor to his debtor with respect to lands held under a deed of trust to secure the debt constituting the first lien thereon will not invalidate his purchase at a sale under such deed, made after the debtor has declared his inability to pay, as against a subsequent judgment creditor, although he requested the trustee to make the sale.<sup>4</sup>

EXECUTORS AND ADMINISTRATORS may purchase at such sales. Thus it has been said an executor or administrator holding a second mortgage, and purchasing the premises at a sale under a prior mortgage, acquires the fee as against third persons, although upon distribution the property is considered as personalty.<sup>5</sup> And the executors of a deceased

<sup>1</sup> Kreitzer v. Crovatt, 94 Ga. 694; s. c. 21 S. E. Rep. 585.

<sup>2</sup> Updike v. Merchants Elevator Co., 96 Mo. 160; s. c. 8 S. W. Rep. 779.

<sup>3</sup> Browne v. Davis, 109 N. C. 23; s. c. 13 S. E. Rep. 703.

<sup>4</sup> Turner v. Littlefield, 142 Ill. 630; s. c. 32 N. E. Rep. 522.

<sup>5</sup> Watson v. Grand Rapids & I. R. Co., 91 Mich. 198; s. c. 51 N. W. Rep. 990.

partner may buy in for his estate firm property sold under foreclosure of a mortgage given by the firm in the lifetime of such partner to secure a firm debt, and are entitled to the possession of the property when they pay off the same out of funds not belonging to the firm.<sup>1</sup>

A MORTGAGEE'S RIGHT TO PURCHASE the mortgaged premises is fully treated in section five hundred and twenty-one of the second edition, and the following section of this Supplement.

A MORTGAGOR may become the purchaser at a sale under the mortgage, whether he still holds or has sold the equity of redemption. But the purchase at a trustee's sale by the mortgagor who has sold the land, the vendee assuming the payment of the debt, does not operate in favor of the vendee as a satisfaction of the mortgage; nor does his assignment of the bid to a third person.<sup>2</sup>

ONE WHOSE PROPERTY IS LIABLE FOR THE DEFICIENCY may not only purchase, but it is thought he may, in some cases of mistake, increase his bid after acceptance. Thus the supreme court of California, in the case of *Weyant v. Murphy*,<sup>3</sup> say that a person interested in having the amount bid on a sale reach the amount of the debt because his own property was liable for the deficiency, who, by a stupid blunder, does not bid that amount, but a less sum only, may be allowed, a few days after, when he has learned his mistake, to increase his bid; and the sale can be reported and confirmed for the amount of the latter bid; and the person entitled to redeem the property, that being primarily liable for the debt, cannot complain.

A PARTY APPRAISING THE MORTGAGED LANDS on foreclosure proceedings is not thereby disqualified from becoming a purchaser at the foreclosure sale; nor does his becoming a purchaser affect his previous appraisal, or shift the burden of proof upon him to show that he was not influenced by selfish motives.<sup>4</sup>

<sup>1</sup> *Heffron v. Knickerbocker*, 57 Ill. App. 336.

<sup>3</sup> 73 Cal. 278; s. c. 20 Pac. Rep. 568.

<sup>4</sup> *Ison v. Kinnaid* (Ky.), 13 Ky. L.

<sup>2</sup> *Bensieck v. Cook*, 110 Mo. 173; Rep. 569, s. c. 17 S. W. Rep. 633. s. c. 19 S. W. Rep. 642.

A PURCHASER FROM A MORTGAGOR of the equity of redemption may become the purchaser at foreclosure sale ; but it is said that such a purchaser, who bids in the property at a sale under the mortgage, should not pay a sum in excess of the mortgage debt, although the mortgagee holds the former's purchase-money note as collateral to such debt in excess of the amount ; but the remainder of the amount due on such note belongs to the mortgagor or owner of the equity of redemption.<sup>1</sup>

A TRUSTEE may purchase at a foreclosure sale in some instances. Thus it has been held that a valid title is vested in a person acting as a trustee for a land company, by a deed made by the auctioneer at a sale under a power contained in a mortgage to such company, which provides that the auctioneer may make a good and perfect title to the purchaser at a sale, and that the mortgagee or his duly authorized agent or trustee may purchase at such sale.<sup>2</sup>

A VENDOR of land taking a deed of trust as security for the purchase money may buy the property at a sale under the deed, either for himself or as agent of another.<sup>3</sup>

A MARRIED WOMAN who signs the mortgage only for the purpose of relinquishing her dower and to secure her husband's debts, may acquire title under foreclosure the same as any other person.<sup>4</sup>

§ 521. Purchase by mortgagee.—That a junior or a senior mortgagee may purchase at the foreclosure sale of another mortgagee, all the courts are agreed ;<sup>5</sup> but regarding

<sup>1</sup> Troy v. May, 101 Ala. 401; s. c. 13 So. Rep. 263.

<sup>2</sup> Gamble v. Caldwell, 98 Ala. 577; s. c. 12 So. Rep. 424.

<sup>3</sup> Loveland v. Clark, 11 Colo. 265; s. c. 18 Pac. Rep. 544.

<sup>4</sup> Toliver v. Morgan, 75 Iowa 619; s. c. 34 N. W. Rep. 858.

<sup>5</sup> See: Herrick v. Tallman, 75 Iowa 441; s. c. 39 N. W. Rep. 699; Manwaring v. Jenison, 61 Mich. 117; s. c. 27 N. W. Rep. 899; Huber v. Cros-

land, 140 Pa. St. 575; s. c. 21 Atl. Rep. 404.

In Michigan one of two mortgages may purchase the property on a mortgage sale ; and it is not necessary that both should be present, or the purchase be made in their joint names. Manwaring v. Jenison, 61 Mich. 117; s. c. 27 N. W. Rep. 899.

In Pennsylvania mortgagees having each a lien on the mortgaged premises have the right to purchase



a mortgagee's right to purchase the property at his own foreclosure sale, the decisions are so various and conflicting that it is idle to attempt to formulate general rules by which the practitioner and the courts can be governed. Some decisions hold such purchases are absolutely void;<sup>1</sup> others that they are voidable only,<sup>2</sup> while others still hold that the decree of foreclosure may properly provide that the mortgagee, or complainant in foreclosure, may purchase,<sup>3</sup> or the instrument itself may authorize such a purchase.<sup>4</sup> All that is attempted to do here is to collect the decisions of the county since the appearance of the second edition of this treatise; and, by giving the substance of those decisions, formulate a rule for each particular State.

It may be premised, however, that where, by statutory provision, or by the permission of the court, the mortgaged premises are purchased by the mortgagee or his assignee, such purchase does not extinguish the mortgage debt, nor any balance that may remain unpaid;<sup>5</sup> for it is held by a

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the property for their joint benefit, and are not obliged to bid against each other. *Huber v. Crosland*, 140 Pa. St. 575; s. c. 21 Atl. Rep. 404.

Where the mortgagee purchases on execution sale subject to his mortgage, the purchase money being paid by the debtor, and at the debtor's request conveyance is made to the wife of the debtor, the mortgagee does not thereby lose his right to foreclose his mortgage. *Corbett v. Howell* (Ky. 1889), 10 S. W. Rep. 653; s. c. 10 Ky. Law Rep. 793.

<sup>1</sup> See: *Simpson v. Simpson*, 107 N. C. 552; s. c. 12 S. E. Rep. 447.

<sup>2</sup> *Lovelace v. Hutchinson* (Ala. 1895), 17 So. Rep. 623; *Durden v. Whetstone*, 92 Ala. 480; s. c. 9 S. Rep. 176; *Martinez v. Lindsay*, 91 Ala. 334; s. c. 8 So. Rep. 787; *Cradock v. American F. L. Mort. Co.* 88 Ala. 281; s. c. 7 So. Rep. 198; *McCall v. Mash*, 89 Ala. 487; s. c. 7 So. Rep.

770; *Very v. Russell*, 65 N. H. 646; s. c. 23 Atl. Rep. 522; *Whitehead v. Whitehurst*, 108 N. C. 453; s. c. 13 S. E. Rep. 166.

<sup>3</sup> *Koerner v. Gauss*, 57 Ill. App. 668.

<sup>4</sup> *Ellenbogen v. Griffey*, 55 Ark. 268; s. c. 18 S. W. Rep. 126.

<sup>5</sup> *Holcomb v. Holcomb*, 11 N. J. Eq. (3 Stock.) 281.

In Oregon a different rule seems to prevail. It is there held that a decree of foreclosure and sale under which mortgaged lands are purchased by the mortgagees extinguishes the mortgage lien; and the mortgagees can not, under an alias execution, sell in satisfaction of a deficiency judgment against the mortgagor a parcel of the same land, which a grantee from the mortgagor subject to the mortgage has redeemed from the foreclosure sale. *Willis v. Miller*, 23 Ore. 352; s. c. 31 Pac. Rep. 827. R

number of well-considered cases that it does not necessarily follow because a mortgagee becomes a purchaser and takes title at the sale under the foreclosure, his mortgage is merged or extinguished in his legal title.<sup>1</sup>

ALABAMA DOCTRINE.—In Alabama a sale upon foreclosure is not void because the mortgagee or his assignee becomes the purchaser.<sup>2</sup> It is merely voidable, and the mortgagor or his privies may disaffirm a sale by the mortgagee under the power in the mortgage, at which he becomes the purchaser without the consent of the mortgagor, or without authority under the terms of the mortgage, where the election to disaffirm and redeem is seasonably expressed.<sup>3</sup> Since such a purchase is, as to the mortgagor, only voidable, and not void, the mortgagor has no alienable interest in the lands after the sale until he has disaffirmed it.<sup>4</sup> Hence a mortgagee who purchases either by himself or through an agent, at a sale made by himself under the power contained in the mortgage, and which does not authorize him to become the purchaser, may come into equity to have the infirmity of his title resulting from the mortgagor's right to disaffirm the sale removed by confirmation or by a resale.<sup>5</sup>

In those cases where there is a sale to third parties under the power contained in the mortgage, regularly conducted, the equity of redemption of the mortgagor and his privies will be cut off, although the mortgagee, without previous arrangement, afterwards takes the lands from the

<sup>1</sup> *Cooper v. Martin*, 1 Dana (Ky.) 23; *Thompson v. Chandler*, 7 Me. (7 Grant) 377; *Hunt v. Hunt*, 31 Mass. (14 Pick.) 374, 384; *Gibson v. Cohen*, 20 Mass. (3 Pick.) 475; *Parker v. Child*, 25 N. J. Eq. (10 C. E. Gr.) 43; *Clas v. Bappe*, 23 N. J. Eq. (7 C. E. Gr.) 270; *Hinchman v. Emans*, 1 N. J. Eq. (Saxt.) 100, 110; *Milford v. Peterson*, 35 N. J. L. (6 Vr.) 127, 131; *Duncan v. Smith*, 31 N. J. L. (2 Vr.) 325, 327; *Vanderkemp v. Shelton*, 11 Paige Ch. (N. Y.) 28; *Benedict v.*

*Gilman*, 4 Paige Ch. (N. Y.) 58; *Forbes v. Moffatt*, 18 Ves. 384, 394; *Mocatta v. Murgatroyd*, 1 Pr. Wms. 393.

<sup>2</sup> *Martinez v. Lindsey*, 91 Ala. 334; s. c. 8 So. Rep. 787.

<sup>3</sup> *Lovelace v. Hutchinson* (Ala. 1895), 17 So. Rep. 623.

<sup>4</sup> *McCall v. Mash*, 87 Ala. 487; s. c. 7 So. Rep. 770.

<sup>5</sup> *Craddock v. American F. L. Mort. Co.*, 88 Ala. 281; s. c. 7 So. Rep. 196.

purchaser at the bid, upon the latter's statement that he is unable to fulfill it.<sup>1</sup>

**ARKANSAS DOCTRINE.**—It is held in Arkansas that the holder of a mortgage containing a power of sale may become the purchaser at his own sale thereunder, if the mortgage expressly authorizes him to do so; and the sale will be valid if it was fairly and faithfully conducted.<sup>2</sup> And it is thought that where the mortgage does not expressly authorize the mortgagee to become the purchaser at his own sale, the sale will not be set aside merely because the mortgagee became the purchaser, in the absence of any showing that the sale was unfairly or unfaithfully conducted.<sup>3</sup>

**ILLINOIS DOCTRINE.**—In Illinois in a decree foreclosing a mortgage it may properly be provided that the complainant may become the purchaser at the sale, without directing that he pay in cash the amount of his bid, where the purpose of the proceeding is to pay the debt with the proceeds of the sale.<sup>4</sup> But a mortgagee who purchases at a sale under foreclosure of his mortgage must account for any surplus of his bid over his mortgage, without allowance for sums paid as interest upon a prior mortgage, or in the purchase thereof.<sup>5</sup>

**INDIANA DOCTRINE.**—In Indiana, where the mortgagee bids in the land on a judgment for more than the debt, he is liable to the person whose land was sold, and who elects to affirm the sale, for the excess of the judgment over what he was entitled to.<sup>6</sup>

**IOWA DOCTRINE.**—In Iowa it has been held that where mortgaged property is not worth more than the mortgage and the interest due, and there being no margin for any creditors of the mortgagor to base attachment suits upon,

<sup>1</sup> *Durden v. Whetstone*, 92 Ala. 480; s. c. 9 So. Rep. 176.

<sup>2</sup> *Ellenbogen v. Griffey*, 55 Ark. 268; s. c. 18 S. W. Rep. 126.

<sup>3</sup> *Matthews v. Daniels* (Ark. 1893), 21 S. W. Rep. 469. See: *Post*. § 534.

<sup>4</sup> *Koerner v. Gauss*, 57 Ill. App. 668.

<sup>5</sup> *Hemm v. Small*, 56 Ill. App. 480.

In **Indiana** the same rule prevails. See: *Mitchell v. Weaver*, 118 Ind. 55; s. c. 20 N. E. Rep. 525.

<sup>6</sup> *Mitchell v. Weaver*, 118 Ind. 55; s. c. 20 N. E. Rep. 525.

In **Illinois** the same rule prevails. See: *Hemm v. Small*, 56 Ill. App. 480.

a purchase by the mortgagee for the amount of the mortgage cannot be successfully attacked, where the mortgagor's assignee has also made a quitclaim deed of the property and the court has approved the sale.<sup>1</sup> But where the mortgagee purchases at his own sale he takes the title with notice of the defects, if there are any, in the foreclosure proceedings.<sup>2</sup>

It is thought that on the foreclosure of a mortgage, a prior mortgagee need not take notice and bid at the sale.<sup>3</sup> And a junior mortgagee, bidding in the land for an amount less than his mortgage, is not precluded from purchasing the senior mortgage and claiming under its foreclosure.<sup>4</sup>

LOUISIANA DOCTRINE.—In Louisiana, in the case of *Factors and Traders Insurance Company v. Levi*,<sup>5</sup> it is held that a mortgage creditor of a delinquent taxpayer, having taken executory proceedings in the foreclosure of his vendor's lien and special mortgage, and at public auction caused the mortgaged property to be adjudicated to him, occupies just the same relation to the assessment of the property for taxes as the mortgagor and taxpayer does. The limitation which the law imposes upon the tax debtor's right of complaint against an alleged illegal assessment is binding upon such adjudicatee.

MINNESOTA DOCTRINE.—In Minnesota it is said that a mortgagee who holds a bond of indemnity against paramount liens should he foreclose his mortgage and bid in the property with such liens upon it, purchases subject thereto.<sup>6</sup>

NEW HAMPSHIRE DOCTRINE.—In the case of *Very v. Russell*,<sup>7</sup> it is said that although a sale under a power contained in a mortgage, at which the mortgagee purchases the property for himself, either personally or through an agent, is voidable, yet an innocent purchaser for value from the

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<sup>1</sup> *Lynch v. Simmons Hardware Co.*, 80 Iowa 503; s. c. 45 N. W. Rep. 1048.

<sup>2</sup> *Boyd v. Ellis*, 11 Iowa 97; *Corriell v. Doolittle*, 2 G. Greene 385, 389.

<sup>3</sup> *Herrick v. Tallman*, 75 Iowa 441; s. c. 39 N. W. Rep. 699.

<sup>4</sup> *Id.*

<sup>5</sup> 42 La. An. 432; s. c. 7 So. Rep. 625.

<sup>6</sup> *Pioneer Sav. & L. Co. v. Freeburg*, 59 Minn. 230; s. c. 61 N. W. 25.

<sup>7</sup> 65 N. H. 646; s. c. 23 Atl. Rep. 522.

mortgagee will be protected in his title. This is on the principle laid down by Judge Story,<sup>1</sup> who says: "If a person who has notice sells to any other who has no notice, and is a *bona fide* purchaser for a valuable consideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he derived it."<sup>2</sup>

NEW YORK DOCTRINE.—In New York a mortgagee who becomes the purchaser at his own foreclosure sale cannot be heard to say that the sale is illegal or irregular where the holder of the subsequent mortgages and the mortgagor make no objection.<sup>3</sup>

Where a mortgage given to indemnify the mortgagee for indorsements and future advances to pay off outstanding judgments against the mortgagor and to save his property from sacrifice, contains no elements of a trust beyond those commonly attending a mortgage given as collateral, the mortgagee may become a purchaser at a sale on foreclosure of the mortgage by advertisement.<sup>4</sup>

NORTH CAROLINA DOCTRINE.—The supreme court of North Carolina, in the case of *Simpson v. Simpson*,<sup>5</sup> say that nothing passes by a mortgage sale and deed of land bid off at the request and for the benefit of the mortgagee pursuant to an agreement entered into prior to the sale between the bidder and the mortgage trustees. But in the later case of *Whitehead v. Whitehead*,<sup>6</sup> it is held that a purchase of lands by a mortgagee at his own sale under a power in his mortgage is not void, but merely voidable; and in those cases where the sale is fair and the price paid reasonable, the mortgagee is bound thereby where the other parties interested do not complain.

<sup>1</sup> See: 2 Story Eq. Jur. § 1502. N. Y. 567 (1889); s. c. 20 N. E. Rep.

<sup>2</sup> See: *Hascall v. Whitmore*, 19 374.

Me. 102; *Smith v. Hiscock*, 14 Me.

449; *Piper v. Hilliard*, 52 N. H.

209, 211; *Stevens v. Morse*, 47 N. H.

532, 537; *Hood v. Fahnestock*, 8 Watts

(Pa.) 489; *Atwater v. Seymour, Brayt.*

(Vt.) 209.

<sup>3</sup> *Andrews v. O'Mahoney*, 112

<sup>4</sup> *Lewis v. Duane*, 141 N. Y. 302; s. c. 36 N. E. Rep. 322; 57 N. Y. S. R. 410.

<sup>5</sup> 107 N. C. 552; s. c. 12 S. E. Rep. 447.

<sup>6</sup> 108 N. C. 458; s. c. 13 S. E. Rep. 116.



**TENNESSEE DOCTRINE.**—In Tennessee it is said that the holders of second-mortgage bonds who buy in the property at a sale under their mortgage, although regarded as trustees for creditors and stockholders, cannot be charged with bad faith for rejecting an offer by a business rival of the mortgagor to bid in the property, where the amount of the bid did not equal what they gave for it, while the requirement of the offer was that they guarantee a good title and act on the suggestions of the rival's attorneys, and the rival had entered into bond with a municipality not to consolidate with the mortgagor.<sup>1</sup>

§ 522. **Memorandum of sale.**—A memorandum of the sale under a mortgage foreclosure should be signed by the officer making the sale, but it is not essential that the purchaser sign the memorandum;<sup>2</sup> and the objection that a sale under the power contained in a mortgage is parol only, and void under the statute of frauds, is not available to the mortgagor, but is personal to the purchaser at the foreclosure sale and the mortgagee.<sup>3</sup>

The court of appeals of New York, in the case of *Andrews v. O'Mahoney*,<sup>4</sup> say that sales in foreclosure actions are not within the statute of frauds, and are binding upon the purchasers without any written contract or memorandum of the terms of the sale; that a purchaser by bidding subjects himself to the jurisdiction of the court, and, in effect, becomes a party to the proceeding, and may be compelled to complete his purchase by an order of the court, and by its process for contempt, if necessary.<sup>5</sup>

<sup>1</sup> *Hunt v. Memphis Gas Light Co.*, 95 Tenn. 136; s.c. 31 S.W. Rep. 1006.

<sup>2</sup> See: Discussion and authorities in second edition of this treatise, § 522.

<sup>3</sup> *Durden v. Whetstone*, 92 Ala. 480; s. c. 9 So. Rep. 176.

<sup>4</sup> 112 N. Y. 567, 572; s. c. 20 N. E. Rep. 374.

<sup>5</sup> See: *Cayet v. Hubbell*, 36 N. Y. 677, 680; *Miller v. Collyer*, 36 Barb. (N. Y.) 253; *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200; *Matter of Davis*,

7 Daly (N. Y.) 7, 8; *Willeys v. Van Alst*, 26 How. (N. Y.) Pr. 325.

A purchaser at a foreclosure sale subjects himself to the jurisdiction of the court in the foreclosure suit, and may be compelled to comply with the conditions of sale; neither mere lapse of time nor the death of one of the parties, is a bar to such relief, where the purchaser has gone into possession. *Cayet v. Hubbell*, 36 N. Y. 677.



§ 523. Report of officer making sale.—It is said by the supreme court of South Dakota, in the case of *State ex rel Kunz v. Campbell*,<sup>1</sup> that a report of a sale on foreclosure of a mortgage, and its confirmation by the court, are proper in South Dakota, but does not decide whether or not they are indispensable.

§ 525. Confirmation of referee's report.—It has been held in New Jersey that in a case where fair competition was not interfered with, and no fraud was shown, the fact that the premises were struck off to a solicitor who signed the conditions as "attorney," and afterwards directed the master to report it in the name of another, is no objection to its confirmation.<sup>2</sup>

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<sup>1</sup> 60 N. W. Rep. 32.

Jenkins, 40 N. J. Eq. (13 Stew.) 451;

<sup>2</sup> *Guarantee Trust & S. D. Co. v. s. c.* 2 Atl. Rep. 13; 2 Cent. Rep. 173.

## CHAPTER XXVI.

### SETTING SALE ASIDE AND RESALE.

GENERAL PRINCIPLES—WHO MAY APPLY FOR—GROUNDS FOR—EFFECT OF  
TERMS IMPOSED—RESALE.

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§ 528. General principles—When sale set aside.—The question of setting aside the sale and of enforcing a contract of sale against a purchaser on a mortgage foreclosure, or other judicial sale under a decree of the court of

chancery, is to be determined upon equitable principles.<sup>1</sup> To set aside a sale made under a power in a trust deed in a direct proceeding for that purpose, the purchaser must be placed in *statu quo*.<sup>2</sup> In Alabama a mortgage foreclosure sale is to be treated as disaffirmed, and the parties considered as occupying the same relation to each other as before the sale, where the mortgagor files a bill to disaffirm and to be let in to redeem, and the mortgagee admits his right to do so.<sup>3</sup> The same court also hold that the validity of a mortgage executed to a foreign corporation not having an office or known place of business or agent within the state, prior to the enactment of the statute<sup>4</sup> to give effect to the constitution,<sup>5</sup> cannot be questioned after a foreclosure and consequent satisfaction of the debt, until the disaffirmance of the foreclosure.<sup>6</sup>

It is thought that a decree obtained in the regular order of proceeding, and which has become absolute, cannot be attacked by a motion to set aside the sale thereunder.<sup>7</sup> And it is said that a complaint by the owner of a decree of foreclosure and by a person to whom he had sold a part of the land foreclosed, asking to have the judgment of satisfaction of the mortgage set aside, and for leave to resell certain real estate under the decree of foreclosure, because the foreclosure sale was invalid for failure to have the land appraised, is subject to demurrer, because the purchaser from the mortgage creditor was entirely destitute of anything upon which to base an action.<sup>8</sup>

It is held in Louisiana that the seizure and sale under execution upon a judgment on a mortgage containing the clause *de non alienando*, instead of by special writ of seizure

<sup>1</sup> Boorum v. Tucher, 51 N. J. Eq. 135; s. c. 26 Atl. Rep. 456. See: *Post*, § 536a.

<sup>2</sup> Chase v. Cleburne First Nat. Bank, 1 Tex. Civ. App. 595; s. c. 20 S. W. Rep. 1027.

<sup>3</sup> Lindsay v. American Mortg. Co., 97 Ala. 411; s. c. 11 So. Rep. 770.

<sup>4</sup> Ala. Act Feb. 28, 1887.

<sup>5</sup> Ala. Const., Art. 4, § 4.

<sup>6</sup> Craddock v. American Freehold Land Mortgage Company, 88 Ala. 821; s. c. 7 So. Rep. 196.

<sup>7</sup> Mann v. Jennings, 25 Fla. 730; s. c. 6 So. Rep. 771.

<sup>8</sup> Peters v. Guthrie, 119 Ind. 441; s. c. 20 N. E. Rep. 536.

and sale, do not affect the validity of the sale as against a purchaser from the mortgagors, although one of the mortgagors is dead, where the actual seizure and sale is within the particular seizure and sale warranted by the judgment.<sup>1</sup>

§ 528a. Same—When not set aside.—The supreme court of Virginia, in the case of *Miller v. Mann*,<sup>2</sup> say that a sale made by the trustee in a trust deed, in accordance with the Virginia Code,<sup>3</sup> when proper and regular in all respects, cannot be set aside by the court. This decision is sound in principle, and it is thought that it will be upheld by other courts. In those cases where the officer making a sale exercises the discretion reposed in him, the sale will not be set aside for the abuse of such discretion unless it clearly appears to the court that the defendant has suffered substantial injury.<sup>4</sup>

While it is the duty of the officer making the sale<sup>5</sup> to have the mortgaged property duly appraised, as provided by the particular statute governing,<sup>6</sup> yet it is said that a foreclosure cannot be set aside for an incorrect appraisement except for fraud, unfairness, or mistake other than a mere erroneous opinion as to value of the property.<sup>7</sup> And it is

<sup>1</sup> *Truxillo v. Delaune*, 47 La. Ann. 10; s. c. 16 So. Rep. 642.

<sup>2</sup> 83 Va. 212; s. c. 13 S. E. Rep. 337; 15 Va. L. J. 633.

<sup>3</sup> Va. Code, § 2442.

<sup>4</sup> *Nix v. Williams*, 110 Ind. 234; s. c. 11 N. E. Rep. 36; 8 West. Rep. 872.

<sup>5</sup> See: *Ante*, §§ 473, 473a, 473b.

<sup>6</sup> See: *Ante*, § 473a.

<sup>7</sup> *Harris v. Gunnell* (Ky. 1888), 9 S. W. Rep. 376. See: *Lawrence v. Edelen*, 6 Bush (Ky.), 55.

**Error of judgment in appraisal of land—Not ground for setting sale aside.**—In *Harris v. Gunnell*, *supra* the appraisement was not attacked upon the ground of fraud, mistake or unfairness. It was assailed for error of judgment on the part of

the appraisers. The courts say: "This cannot avail. It furnishes no ground for setting aside a sale. The valuation of the appraisers, if fairly made, furnishes the legal test of the debtor's right to redeem, although they may err in judgment in fixing it. An incorrect appraisement can only avail to set aside a sale when it is the product of fraud, or unfairness or mistake other than one arising merely from an erroneous opinion as to value. *Lawrence v. Edelen*, 6 Bush (Ky.), 55. \* \* \* It is well settled that inadequacy of price alone, unless it is so gross as to impart fraud, does not furnish ground for setting aside judicial sales. The law, in establishing this rule, looks to their promotion and stability. In the absence of all unfair

the well settled rule that equity will not set aside a sale made under a trust deed simply upon the ground that at the time of the sale the trust property was incumbered by other trusts and judgment liens, especially where there is no uncertainty or controversy between the parties as to the amounts and priorities of such liens.<sup>1</sup>

Where several adjoining tracts of land are sold in a lump under a decree of foreclosure, the sale will not be set aside on the ground that the mortgagor at the time of the sale requested a sale in separate tracts.<sup>2</sup> Neither will a sale made under a power in a mortgage be set aside because of the non-observance of a custom among auctioneers to place notices upon the doors or windows of the house for sale, stating the time and place of sale.<sup>3</sup> And the fact that property sold on foreclosure subject to redemption brought a grossly inadequate price will not be grounds for setting the sale aside, for the reason that it is not to be reasonably expected that there will be competition at such a sale.<sup>4</sup>

The supreme court of California, in the case of *Santa Marina v. Connolly*,<sup>5</sup> say that in those cases where, under an agreement between the owner of the land, the mortgagee, and an assignee of the mortgage for collateral

dealing, public policy requires that the rights of the purchasers should be regarded. The chancellor is not vested with a mere arbitrary discretion in the matter. If there has been fraud, surprise, accident, or any unfairness, he should annul the action of the commissioner, who is his agent; but, in their absence, and where the sale has been conducted in pursuance of the judgment, the claims of the purchaser cannot be disregarded. If inadequacy of price alone would authorize a disregard of them, then inducement to bid would be taken away, and purchases at judicial sales would become a mere speculation. While courts incline to the relief of the debtor's burden by affording him

an opportunity to apply the fair value of his property upon his indebtedness, yet a rule must be applied which, while as liberal to him as public policy will permit, must yet be of such a character as to invite reliable bidders and secure competition."

<sup>1</sup> *Lallance v. Fisher*, 29 W. Va. 512; s. c. 2 S. E. Rep. 775.

<sup>2</sup> *Hopkins v. Wiard*, 72 Cal. 259; s. c. 13 Pac. Rep. 687. See: *Ante*, §§ 484, 484a, 484b, 484c, 486, 488.

<sup>3</sup> *Chilton v. Brooks*, 69 Md. 584; s. c. 16 Atl. Rep. 273. See: *Post*, §§ 536, 800.

<sup>4</sup> *Equitable Trust Co. v. Thorpe*, 73 Iowa 279; s. c. 34 N. W. Rep. 867.

<sup>5</sup> 79 Cal. 517; s. c. 21 Pac. Rep. 1093.

security, the owner conveys the land to an outside party for a certain sum; and it is then agreed that the holder of the mortgage shall foreclose it, and shall, at the sale, bid a certain amount in excess of the sum paid for the conveyance, and transfer the certificate of sale to the first purchaser, or if more is bid than the agreed amount, shall pay to such purchaser the sum agreed upon; and that he shall then convey to the original owner—the transactions, being in good faith and carried out accordingly, without fraudulent intent as to junior lien-holders, are valid, and are not prejudicial to such lien-holders. The purchaser is not prevented by their existence from availing himself of the foreclosure as against such junior liens. The fact that the amount agreed to be bid exceeds the amount paid by the first purchaser of the property is an actual benefit to the junior lien-holders, and not to their prejudice, as it decreases the deficiency of the original mortgage.

§ 529. *Discretion of court.*—It is conceded on all hands that a party has no absolute right to have a foreclosure sale set aside and a resale ordered; and the discretion of the court in granting or refusing an order in that regard will not be reviewed unless the discretion is abused.<sup>1</sup>

The supreme court of New York, in the case of *Stevens v. Union Trust Company*,<sup>2</sup> say that the granting of a motion for a resale of property sold under a foreclosure decree, rests in the discretion of the court, even where the purchaser is a *bona fide* one and has paid the consideration.

In Ohio it is held that the discretionary power of the court of common pleas (in which resides the jurisdiction in such cases) to set aside a sale in foreclosure, and the order confirming such sale, at the term at which they were made, is not lost by continuing the motion to the next term.<sup>3</sup>

§ 530. *Who may have sale set aside.*—Any one in-

<sup>1</sup> *Farmers Loan & T. Co. v. Bankers & M. Teleg. Co.*, 119 N. Y. 15; s. c. 23 N. E. Rep. 173; 28 N. Y. S. R. 679.

<sup>2</sup> 57 Hun (N. Y.) 498; s. c. 11 N. Y. Supp. 268; 33 N. Y. S. R. 130.

<sup>3</sup> *Niles v. Parks*, 49 Ohio St. 370; s. c. 34 N. E. Rep. 735.



juriously affected may have the sale made under a foreclosure decree set aside, on motion and proper showing, even though not originally a party to the suit. Thus it has been said that a judgment creditor of the mortgagor who was prevented from attending the sale by reason of misinformation from plaintiff's brother, where he is willing to pay a substantial advance on the price bid, is entitled to have the sale set aside and a resale ordered.<sup>1</sup> But it is said in *Melton v. Shenango Natural Gas Company*,<sup>2</sup> that a judgment creditor of a corporation cannot except to the return of a sheriff upon a sale under execution on a mortgage foreclosure of the franchises of the company, on the ground that the mortgage was void as exceeding half the stock paid in, and as an illegal increase of indebtedness, since if the mortgage is invalid and collusive the property of the defendant in execution is not divested by the sale as against *bona fide* creditors, and if valid such creditor cannot attack the creation of the mortgage indebtedness.

It has been said that parties who have been personally served with summons and appeared in a mortgage foreclosure suit cannot afterwards, to defeat confirmation, assail the decree for a mere irregularity.<sup>3</sup> And a mortgagor who is released from the bond has no interest in the mortgaged premises after their sale under execution against him subject to the lien of the mortgage, which will entitle him to have a judgment *in rem* upon the mortgage opened to allow him to plead usury, since, even if he could be subrogated to the rights of the mortgagee upon payment, he could not enforce the usurious part of the mortgage against the purchaser at execution sale.<sup>4</sup>

The court of appeals of New York, in the case of *Andrews v. O'Mahoney*,<sup>5</sup> say that a mortgagee who himself

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<sup>1</sup> *Corwith v. Barry*, 69 Hun (N. Y.) 113; s. c. 23 N. Y. Supp. 200; 53 N. Y. S. R. 53.

<sup>2</sup> 157 Pa. St. 627; s. c. 27 Atl. Rep. 793.

<sup>3</sup> *Stratton v. Reisdorph*, 35 Neb. 314; s. c. 53 N. W. Rep. 136.

<sup>4</sup> *Reap v. Battle* (Pa. C. P.), 6 Kulp. 423.

<sup>5</sup> 112 N. Y. 567; s. c. 20 N. E. Rep. 374; 21 N. Y. S. R. 533.

conducted the foreclosure sale and bid off the property cannot, to avoid his liability to complete the purchase, be heard to say that the sale is illegal or irregular because of the sale of two parcels when one would have been sufficient, where the holder of subsequent mortgages and the mortgagor make no objection.<sup>1</sup> In those cases where the ostensible purchaser at a trustee's sale under a trust deed directs the deed to be made to another, a stranger to the sale cannot, in the absence of fraud, complain that the real purchaser did not make his bid in person.<sup>2</sup> The supreme court of Alabama, in the case of *Jones v. Hagler*,<sup>3</sup> say that in those cases where the grantor in a trust deed has obtained the credit and benefit of the amount bid at the trustee's sale, neither he nor any other person not a beneficiary can complain because the payment was not made in cash. It is well settled that one not a party to a sale under a trust deed has no right to object that a delay in executing the deed to the purchaser was a badge of fraud, where he does not suggest any fact to show that he has any interest which would entitle him to complain of such delay.<sup>4</sup>

The supreme court of Michigan, in *Long v. Kaiser*,<sup>5</sup> say

<sup>1</sup> Under New Jersey Revised Statutes, p. 110, §§ 41, 42, a second mortgagee who took his mortgage after the decree foreclosing the first mortgage had been opened to enable the mortgagor to charge the person in possession with the rents and profits as mortgagee in possession, could not thereafter attack the decree rendered in such proceedings. *Smith v. Davis* (N. J. Ch. 1890), 19 Atl. Rep. 541.

One of the second-mortgage or income bondholders of a railroad, in behalf of the others, cannot maintain a suit in equity to set aside a foreclosure sale of the railroad on the first mortgage to a committee of the first-mortgage bondholders, or to declare the sale to be in trust for both classes of bondholders, on the ground

of a breach of an agreement, made without consideration or mutuality, between committees of both classes of bondholders, that the second-mortgage bondholders should participate in the re-organization of the company after the sale, and rank therein as they ranked previously, where there is no charge of fraud and no offer by the latter to redeem from the sale. *Robinson v. Iron R. Co.*, 135 U. S. 522; bk. 34 L. ed. 276; s. c. 10 Sup. Ct. Rep. 907.

<sup>2</sup> *Jones v. Hagler*, 95 Ala. 529; s. c. 10 So. Rep. 345.

<sup>3</sup> 95 Ala. 529; s. c. 10 So. Rep. 345.

<sup>4</sup> *Jones v. Hagler*, 95 Ala. 529; s. c. 10 So. Rep. 345.

<sup>5</sup> 81 Mich. 518; s. c. 46 N. W. Rep. 19.

that where the mortgagee of an entire tract of land afterwards conveyed by the mortgagor in parcels under an agreement whereby the purchaser of the first parcel was to pay the entire mortgage was not called upon to sell in parcels, or to respect the rights of a subsequent purchaser, the latter, who did not take any steps to protect his equities until several months after the sale, cannot maintain a bill to set the sale aside, but can protect his interests only by paying the mortgage and putting himself in the mortgagee's place. And it is said that a third possessor of property seized and sold to satisfy a previous mortgage has no right to question whether the vendee paid the price or complied with the terms of sale, where such possessor is not an heir of the execution defendant or interested in the distribution of the proceeds of the sale.<sup>1</sup>

§ 530a. **Same—Junior Mortgagee—Effect of.**—The supreme court of Indiana, in the case of *Wright v. Churchman*,<sup>2</sup> say that a successful application made by a junior lienor to have a decree of foreclosure set aside as to him does not affect the decree so far as it disposes of the rights of the mortgagor.

§ 531. **How sale may be set aside.**—The supreme court of Minnesota, in the case of *Russell v. Gunn*,<sup>3</sup> say that under the statute of that state,<sup>4</sup> upon a proper application, the district court may set aside or modify its judgments on foreclosure actions and the proceedings in execution thereof, in favor of any party whose rights have been injuriously affected. In Michigan it is held that one who seeks to have a sale of land under mortgage foreclosure set aside is properly required to pay the mortgage indebtedness, where the mortgage was extinguished, if at all, only by such sale.<sup>5</sup> The supreme court of Maine, in the case of

<sup>1</sup> *Deroner v. Herbert*, 46 La. An. 1388; s. c. 16 So. Rep. 160.

<sup>2</sup> 135 Ind. 683; s. c. 36 N. E. Rep. 835.

<sup>3</sup> 40 Minn. 463; s. c. 42 N. W. Rep. 301.

<sup>4</sup> Minn. Gen. Stat. c. 66, § 125, as amended by laws, 1887, c. 61.

<sup>5</sup> *De Mey v. Defer*, 103 Mich. 239; s. c. 61 N. W. Rep. 524.

Haskie v. James,<sup>1</sup> say that an *ex parte* affidavit of an exceptant to a mortgage sale is not a sufficient compliance with the rule requiring the exception to be supported by competent testimony.

§ 532. **Time of making application for resale.**—An objection to a sale under a decree of foreclosure must be seasonably made, and if not so made, or a valid and sufficient legal excuse given for the delay, the sale will not be set aside and a new sale ordered.<sup>2</sup> And it has been said by the supreme court of Maryland, in the case of Roberts v. Loyola Perpetual Building Association,<sup>3</sup> that exceptions to a mortgage sale are not to be taken as true because verified by the exceptant and not denied by an answer, but must be supported by competent proof.

ILLINOIS DOCTRINE.—In Illinois it is held that a foreclosure sale will not be set aside for irregularity in selling two separate tracts together, after the period of redemption has expired.<sup>4</sup> And an application to set aside a decree of foreclosure on the ground that the sale was for an inadequate price must be denied for laches, where the applicant waited three years after notice of foreclosure, and the prop-

<sup>1</sup> 75 Md. 568; s. c. 23 Atl. Rep. 1030.

<sup>2</sup> See: Connely v. Rue, 148 Ill. 207; s. c. 35 N. E. Rep. 824; Nichols v. Otto, 132 Ill. 91; s. c. 23 N. E. Rep. 411; Flynn v. Wilkinson, 56 Ill. App. 239; Harrington v. Fidelity Loan & T. Co. (Ia.), 58 N. W. Rep. 1059; Ingalls v. Bond, 66 Mich. 338; s. c. 33 N. W. Rep. 404; 9 West. Rep. 861; Morgan v. Carter, 54 Minn. 141; s. c. 55 N. W. Rep. 147; Coles v. Yorks, 36 Minn. 388; s. c. 31 N. W. Rep. 353; F. G. Oxley Stave Co. v. Butler Co., 121 Mo. 614; 26 S. W. Rep. 367; Cross v. Hendrick, 66 Miss. 61; 7 So. Rep. 496; Pitt v. Amend, 84 Hun (N. Y.) 492; s. c. 32 N. Y. Supp. 423; Benninghoff v. Stephenson, 161 Pa. St. 440;

s. c. 29 Atl. Rep. 87; Trilling v. Schumitsch, 67 Wis. 186; s. c. 30 N. W. Rep. 222; McBride v. Gwynn, 33 Fed. Rep. 402; Crutchfield v. Hewett, 2 App. Cas. D. C. 373; s. c. 22 Wash. L. Rep. 127.

Application for relief from a foreclosure judgment and sale, on the ground of excusable neglect, should be made within a year after notice of the proceedings. Rev. Stat. § 2832. Aside from the statute, a delay in this case of more than six years was unreasonable and inexcusable. Trilling v. Schumitsch, 67 Wis. 186; s. c. 30 N. W. Rep. 222.

<sup>3</sup> 74 Md. 1; s. c. 21 Atl. Rep. 684.

<sup>4</sup> Flynn v. Wilkinson, 56 Ill. App. 239.

erty was subject to speculative fluctuations of value, and no fraud is shown in the sale.<sup>1</sup>

It is said in the case of *Nichols v. Otto*,<sup>2</sup> that where the owner of the equity of redemption knows of the defects attending a sale of the mortgaged premises, he must, as a general rule, proceed with diligence in his application to set the sale aside, or a court of equity will refuse relief.

IOWA DOCTRINE.—In Iowa it is held that an error in the description of property in the execution issued under a decree of foreclosure and sale, which is carried into the notice of sale, but which is afterwards corrected, does not relieve the part of the land described and the mortgage and the decree, which by the error was excluded from the description in the execution, from the lien in the decree, upon the sale, and the deeds in pursuance thereof being set aside by the court and another special execution ordered, where the mortgage debt is about equal to the value of the whole property mortgaged.<sup>3</sup>

MICHIGAN DOCTRINE.—The Michigan supreme court, in the case of *Ingalls v. Bond*,<sup>4</sup> on a bill to set aside a foreclosure and declare a mortgage canceled filed, before the sheriff's deed became absolute, evidence that the complainant paid the mortgage eighteen months after the alleged assignment, but before it had been placed on record, and without notice thereof, was held to entitle him to the relief prayed for.

MINNESOTA DOCTRINE.—In Minnesota a failure to bring an action within five years after the sale, to set aside the foreclosure of a mortgage under a power of sale, invalid by reason of failure to publish the notice of sale the requisite length of time, waives the right given by the state statute<sup>5</sup> to have the sale declared invalid within five years.<sup>6</sup> And it

<sup>1</sup> *Connely v. Rue*, 148 Ill. 207; s. c. 35 N. E. Rep. 824.

<sup>2</sup> 132 Ill. 91; s. c. 23 N. W. Rep. 411.

<sup>3</sup> *Harrington v. Fidelity Loan & T. Co.*, 91 Iowa 703; s. c. 58 N. W. Rep. 1059. s

<sup>4</sup> 66 Mich. 338; s. c. 33 N. W. Rep. 404; 9 West. Rep. 861.

<sup>5</sup> Minn. Laws, 1883, c. 112.

<sup>6</sup> *Morgan v. Carter*, 54 Minn. 141; s. c. 55 N. W. Rep. 1117.



is held in the same state that reasons for setting a foreclosure sale aside, founded upon irregularities in the foreclosure sale, are not available upon an application after confirmation and final decree, unless a sufficient excuse is shown for failure to present such reasons in opposition to the application to confirm the sale.<sup>1</sup>

MISSOURI DOCTRINE.—It is held in Missouri that a sale of lands under a trust deed will not be set aside, more than twenty years afterwards, at the suit of a stranger to the proceedings who has since become interested by purchase, on the sole ground that two of the three trustees appointed to succeed others, who had died, were not made parties, where the sale having been made by a special commissioner appointed by the court.<sup>2</sup>

MISSISSIPPI DOCTRINE.—The Mississippi supreme court, in the case of *Cross v. Hedrick*,<sup>3</sup> say that if the right to credits on an account secured by a deed of trust is lost by lapse of time and by failure to claim them on sale of the land, it cannot be revived by annulling the sale for the purpose of allowing them.

NEW YORK DOCTRINE.—The supreme court of New York, in the case of *Pitt v. Amend*,<sup>4</sup> say that failure to give notice of a sale on foreclosure of a mortgage by advertisement, to the personal representatives of a deceased mortgagor, as required by the statute,<sup>5</sup> will not warrant a disturbance of the sale after more than twenty-five years where no administration was ever had upon the decedent's estate, it is not shown who the decedent's heirs were, and her husband and co-mortgagor was served with notice, and all the other proceedings were regular.

PENNSYLVANIA DOCTRINE.—The supreme court of Pennsylvania, in the case of *Benninghoff v. Stephenson*,<sup>6</sup> say that it is too late to question the validity of the acknowl-

<sup>1</sup> *Coles v. Yorks*, 36 Minn. 388; s. c. 31 N. W. Rep. 353.

<sup>2</sup> *F. G. Oxley Stave Co. v. Butler County*, 121 Mo. 614; s. c. 26 S. W. Rep. 367.

<sup>3</sup> 66 Miss. 61; s. c. 7 So. Rep. 496.

<sup>4</sup> 84 Hun (N. Y.) 492; s. c. 32 N. Y. Supp. 423.

<sup>5</sup> N. Y. Laws, 1844, c. 346.

<sup>6</sup> 161 Pa. St. 440; s. c. 29 Atl. Rep. 87.



edgment of a mortgage, or the regularity of proceedings under *scire facias* prior to the acknowledgment and delivery of a sheriff's deed on a sale thereunder, after acknowledgment and delivery of the deed.

FEDERAL COURT DOCTRINE.—The United States court of appeals for the District of Columbia, in the case of *Crutchfield v. Hewett*,<sup>1</sup> hold that a sale under a power in a trust deed requiring publication “in some newspapers” will not be set aside after seventeen years because publication was had but in one newspaper, even if the interpretation of the term by the trustee was mistaken, where no harm can be shown to have resulted from it. And the United States district court for the district of Colorado, in the case of *McBride v. Gwynn*,<sup>2</sup> say objections that notice of a master's sale was not published as long as required by law by only one day, and that part of the property sold for less than it should by reason of such master's incompetency, come too late when made two years after the sale.

§ 533. When application for resale will be granted. —The general rule is that the court will always, if possible by ordering a resale, secure to owners of mortgaged land a fair sale at full value, and especially when the purchaser is the plaintiff in foreclosure, or the plaintiff's agent.<sup>3</sup> And in those cases where the defendant has been required to pay moneys merely as a condition of an adjournment of a sale of mortgaged premises, this will be good reason for setting aside the sale and ordering a resale.<sup>4</sup> And it is said that a sale by trustees under a mortgage will be set aside when made to one who has previously made a higher bid and withdrawn it at the suggestion of the trustee, although such suggestion was made in the belief that the purchaser was induced to make the bid by puffing bids of others.<sup>5</sup>

<sup>1</sup> 2 App. Cas. D. C. 373; s. c. 22 Wash. L. Rep. 127.

<sup>2</sup> 33 Fed. Rep. 402.

<sup>3</sup> *New York Eastern C. & B. Assoc. v. Bishop*, 28 N. Y. S. R. 22; s. c. 8 N. Y. Supp. 60.

<sup>4</sup> *Holland Trust Co. v. Hogan*, 17

N. Y. Supp. 919; s. c. 44 N. Y. S. R. 577.

<sup>5</sup> *Fishburne v. Smith*, 34 S. C. 330; s. c. 13 S. E. Rep. 525.

A second sale by the trustee in a trust deed after delivery, acceptance, and recording of the deed

In the case of *Fishburne v. Smith*,<sup>1</sup> it is said that a sale under a mortgage cannot be sustained when the purchaser did not make the cash payment required by the terms of sale, although he represented the mortgagees, where costs and expenses are first to be paid out of the proceeds.<sup>2</sup> And it is said that a mistake of a purchaser at foreclosure sale of two adjoining lots, as to the street upon which they fronted, by which he was led to believe that each had a house upon it, and to purchase them at equal prices less than the value of one and greater than that of the other, when, in fact, the houses were upon the same lot, which was thereby made one of much greater value than the other, entitles him, as against a purchaser of the equity of redemption who seeks to redeem only the more valuable lot, to have the sale set aside and a new foreclosure of the mortgage.<sup>3</sup>

The New Jersey court of chancery, in the case of *Miller v. Kendrick*,<sup>4</sup> say that a resale in foreclosure proceedings will be ordered on the application of the mortgagor, although he did not object to the report advertising a sale in the manner which was pursued, where it appears that a larger sum can be obtained on resale.

It seems that an order for a resale is unnecessary in a suit to correct a mistake in the description of land in a fore-

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upon the first sale, and a subsequent reconveyance by the purchaser, made without the consent of the mortgagor, to the same purchaser, for the purpose of relieving the latter from paying a surplus which by the terms of the trust deed was payable to the mortgagor, is a nullity and conveys no title, even though the original purchase was made upon unauthorized representations by the trustee that the surplus might be applied upon prior debts due from the mortgagor to the purchaser. *Gair v. Tuttle*, 49 Fed. Rep. 193.

<sup>1</sup> 34 S. C. 330; s. c. 13 S. E. Rep. 525. See: *Convers v. Clay*, 86 Mich. 375; s. c. 49 N. W. Rep. 473.

<sup>2</sup> Demanding immediate payment of amount of bid by the commissioner at a foreclosure sale of several parcels of land of the highest bidder for one parcel, and, the same not being produced on the spot, sold all the parcels in a lump, and afterwards refused to accept the amount previously bid on the one parcel and give a deed thereof, a resale is properly ordered without imposing conditions upon the exceptants. *Converse v. Clay*, 86 Mich. 375; s. c. 49 N. W. Rep. 473.

<sup>3</sup> *Root v. King*, 91 Mich. 488; s. c. 51 N. W. Rep. 1118.

<sup>4</sup> 15 Atl. Rep. 259; 13 Cent. Rep. 352.

closure decree and commissioner's deed, if the conduct of the mortgagor amounts to a waiver, and the subsequent grantees from him do not hold in good faith.<sup>1</sup>

The supreme court of Iowa, in the case of *Brown v. Brown*,<sup>2</sup> say that where one judgment in foreclosure is against one defendant, and two other judgments in foreclosure are against him and another person jointly, they cannot be satisfied by one sale, and an attempted sale must be held invalid as to both defendants.

§ 533a. When application for resale denied.—An injury, just before sale, to the mortgaged property by the elements, is not a ground for setting the sale aside. Thus it has been said that a sale under a trust deed will not be set aside because made just after a disastrous overflow, where there is no reason to believe that the sale would have been averted had the overflow not occurred.<sup>3</sup> And it has been held that a mortgage foreclosure sale will not be set aside on the application of a defendant merely because the premises were bought by plaintiff's attorney for his own benefit, where the latter's conduct was fair and honest.<sup>4</sup>

In those cases where there is a sale for a gross sum of premises claimed to constitute several parcels, and sold to different vendees subsequent to the execution of the mortgage, is voidable, and not void,<sup>5</sup> and will not be set aside where the latter have not objected to the sale, or shown any excuse for not doing so, and no fraud is charged.<sup>6</sup> And the supreme court of Kentucky, in *Commonwealth v. Robinson*,<sup>7</sup> say that a sale under foreclosure of a mortgage will be set aside and a resale ordered, where the owner of a judgment upon which an execution had been issued and levied upon the property was not a party to the proceed-

<sup>1</sup> *Merrifield v. Ingersoll*, 61 Mich. 4; s. c. 27 N. W. Rep. 714.

<sup>2</sup> 73 Iowa 430; s. c. 35 N. W. Rep. 507.

<sup>3</sup> *Dunton v. Sharpe*, 70 Miss. 850; s. c. 12 So. Rep. 800.

<sup>4</sup> *Holland Trust Co. v. Hogan*, 44

N. Y. S. R. 577; s. c. 17 N. Y. Supp. 919.

<sup>5</sup> See: *Ante*, §§ 484-491.

<sup>6</sup> *Clark v. Kraker*, 51 Minn. 444 (1892); s. c. 53 N. W. Rep. 706.

<sup>7</sup> 96 Ky. 553; s. c. 29 S. W. Rep. 306; 16 Ky. L. Rep. 558.

ing, under the Kentucky statute,<sup>1</sup> providing that no sale of property under the lien shall be ordered prejudicial to the rights of the owners of other liens, although no action was taken under the levy for more than a year after it was made, pending a motion for a new trial.

The supreme court of the United States say that the holders of second mortgage bonds cannot avoid a sale under the first mortgage, on the ground of the incapacity of the state as trustee in that mortgage to purchase at the sale, without tendering reimbursement of the amount of the first mortgage.<sup>2</sup> And it has been held that a motion to open a decree foreclosing a mortgage, and bring in as defendant a grantor who does not appear by the judgment roll to have been unmarried, is properly denied where such grantor described himself in his deed as unmarried, and it appears that the party in interest making the application was a party to various suits to which the grantor made affidavits that he was unmarried.<sup>3</sup>

§ 534. When sale may be set aside where plaintiff is purchaser.—The supreme court of Arkansas, in the case of *Matthews v. Daniels*,<sup>4</sup> say that a sale under a power in a mortgage cannot be set aside merely because the mortgagee becomes the purchaser thereat, in the absence of any showing that it is unfairly or unfaithfully conducted.<sup>5</sup>

§ 535. What advance must be bid on resale.—At any time before a sale made in pursuance of a decree of foreclosure is confirmed, the court may open the biddings and order a resale, on the application of any one liable for the deficiency, on such party offering to bid a sufficient advance over the sum received.<sup>6</sup> As to what advance will be sufficient to justify setting aside the sale is a matter resting largely in the discretion of the court. It may be stated as

<sup>1</sup> Ky. Civ. Code, § 694. ¶ 3.

<sup>2</sup> *Cunningham v. Macon & B. R. Co.*, 156 U. S. 400; bk. 39 L. ed. 471; s. c. 61 Am. & Eng. R. Cas. 661; 15 Sup. Ct. Rep. 361.

<sup>3</sup> *Holland Trust Co. v. Hogan*, 17

N. Y. Supp. 919; s. c. 44 N. Y. S. R. 577

<sup>4</sup> 21 S. W. Rep. 469.

<sup>5</sup> See: *Ante*, § 521.

<sup>6</sup> See: *Ante*, §§ 528, 528a, 529.

a general rule, however, that a sale will not be set aside merely upon a guaranty of an advanced price. It was, and perhaps still is, the English practice to set aside the sale whenever the advance equals ten percentum of the price brought and the costs; but this practice has never obtained generally in this country.<sup>1</sup> In a Kentucky case the court say: "One who was present at the sale, or who at least might have been, should not be allowed to make it a mere matter of play by thereafter offering an advanced price. It follows that the bond given in this case, stipulating that upon a resale eighty acres of the land should be made to pay the debt, or bring as much as the entire tract brought at the sale in question, did not, of itself, authorize another sale."<sup>2</sup>

It is the general rule that as a condition of such opening and resale the court may impose terms,<sup>3</sup> such as requiring the costs of the former sale to be paid, and the like.<sup>4</sup> But the supreme court of Michigan, in the case of *Page v. Kress*,<sup>5</sup> say that a resale of mortgaged premises will not be ordered upon the offer of an increase of price alone, when the property has not been sold at a sacrifice; and that the fact a person is willing to give \$1,000 for property worth \$900, is not a sufficient ground for granting a resale. And the supreme court of New York, in the case of *Wesson v. Chapman*, say that a resale of premises sold under foreclosure of a mortgage will not be granted upon an offer to bid double the amount, given by one who was absent at the time of the sale, where but little benefit will result to him therefrom, and the prejudice to the purchaser as well as to the public may be considerable, particularly when the one making the application is not free from the imputation of laches, and the sale was fairly conducted by the referee. But it is said by the same court, in the former case of *Corwith v. Barry*,<sup>7</sup> that a resale in a foreclosure action is prop-

<sup>1</sup> *Harris v. Gunnell* (Ky. 1838), 9 S. W. Rep. 376.

<sup>2</sup> *Id.*

<sup>3</sup> See: *Post*, § 548.

<sup>4</sup> See: *Wiltie's Mort. Forc.* (2d ed.) p. 650.

<sup>5</sup> 80 Mich. 85; s. c. 44 N. W. Rep. 1052.

<sup>6</sup> 76 Hun (N. Y.) 592; s. c. 28 N. Y. Supp. 192; 58 N. Y. S. R. 252.

<sup>7</sup> 69 Hun (N. Y.) 113; s. c. 23 N. Y. Supp. 200; 53 N. Y. S. R. 53.



erly ordered upon the application of a judgment creditor of the mortgagor who was prevented from attending the sale by reason of misinformation from plaintiff's brother, and who expresses a willingness to pay twice the amount for which the property is sold.

And it has been held that a sale of the whole premises under a decree of foreclosure will be set aside at the instance of a purchaser of a half interest therein subject to the mortgage, on due security being given for an advance bid, where such purchaser of the half interest has been led into the belief that the sale would not divest his interest, and there is some evidence of an understanding with one of the holders of the mortgage that his half interest in the mortgaged premises should be released.<sup>1</sup>

§ 536. What sufficient grounds for setting sale aside. —A sale under a decree of foreclosure will be set aside upon good and sufficient cause shown. What is good and sufficient cause rests largely in the discretion of the court. It has been held that a sale will be set aside where there has been a manifest disposition to favor the purchaser at the expense of the defendant;<sup>2</sup> where it appears that the purchaser made no payment;<sup>3</sup> where the date of sale in the advertisement was wrong;<sup>4</sup> where no duplicate of the certificate of purchase has been filed for record as required by statute, and it is doubtful whether such certificate has been

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<sup>1</sup> *Scranton Savings Bank & Trust Co. v. Pier* (Pa. C. P.), 1 Lackw. L. News 87.

<sup>2</sup> Thus it is held that a sale of mortgaged premises for less than half their value will not be confirmed, where there has been an adjournment once each week for at least twelve times, in the interest of the purchaser, and the attorney for the owner of a three-fourths interest in the property, who has been present each preceding time, was detained in his office until after the time of the sale, and both he and his clients were surprised at its being sold

without his presence, as he had stated on the preceding evening that he intended to bid, and the purchaser did not buy in his own interest or for a stranger to the action. *Workingmen's Mut. Bldg. Loan Asso. v. McGillick* (N. J. Ch. 1894), 28 Atl. Rep. 468.

<sup>3</sup> *Harwood v. Cox*, 26 Ill. App. 374.

<sup>4</sup> Where the date of sale in the advertisement of sale was wrong, the supreme judicial court of Kentucky say that the sale under foreclosure of a mortgage should not be confirmed, although it recited that it was to be made on county court day, which is a



delivered to the purchaser; where there has been misleading information given out by the mortgagor or his assignor, who is foreclosing;<sup>2</sup> where several lots are sold as one parcel;<sup>3</sup> where the sale is made at an unsuitable hour;<sup>4</sup> where there has been unwarrantable interference with the bidders by any one responsible to the court in the action;<sup>5</sup> and also in those cases where a foreclosure and sale is made

fixed date. *Hendrix v. Nesbitt*, 96 Ky. 652; s. c. 29 S. W. Rep. 527; 16 Ky. L. Rep. 746.

<sup>1</sup> *Harwood v. Cox*, 26 Ill. App. 374.

<sup>2</sup> **Misleading information.**—Thus the common pleas court of the State of Pennsylvania have held that a foreclosure sale under a mortgage upon the whole premises will be set aside at the instance of a purchaser of a half interest subject to such mortgage, on due security being given for an advanced bid, where he has been led into the belief that the sale would not divest his interest, and there is some evidence of an understanding with one or more of the holders of the mortgage that his interest should be released. *Scranton Sav. Bank & T. Co. v. Pier*, (Pa. C. P.) 1 Lackw. L. News 87.

<sup>3</sup> *Bozarth v. Larget*, 128 Ill. 95; s. c. 21 N. E. Rep. 218; *Larkin v. Brouty*, 15 N. Y. Supp. 509; 39 N. Y. S. R. 879. See: *Ante*, § 484, *et seq.*

**Sale of mortgaged premises en masse** does not render the sale void, but, at most, is only ground for setting it aside on proper application. *Bozarth v. Larget*, 128 Ill. 95; s. c. 21 N. E. Rep. 218.

**Sale in foreclosure of several lots in one parcel** will be set aside where the judgment did not direct the referee to sell in that manner, and it is shown that the property would have

produced more had the lots been sold separately. *Larkin v. Brouty*, 15 N. Y. Supp. 509; s. c. 39 N. Y. S. R. 879.

<sup>4</sup> **As to hour of day of sale.** See: *Ante*, § 478.

**Unsuitableness of the hour** at which the sale of lands under a power in a deed of trust was begun and accomplished is a circumstance calculated to cast suspicion on the correctness of the sale, and is sufficient to warrant the court in setting the sale aside, when to that is added great inadequacy of price. *Fowler v. Taylor*, 19 D. C. 456; s. c. 19 Wash. L. Rep. 131.

**Sale under a deed of trust at 11 a. m.** will be set aside where the usual hour for such sales is in the afternoon and the property brought but little more than one-fourth its value; especially is this the case where a person interested in the sale informed the sheriff that he wished to be represented at the sale, and was unable, in the exercise of due diligence, to reach the place of sale in time, but arrived an hour afterwards. *Holdsworth v. Shannon*, 113 Mo. 508; s. c. 21 S. W. Rep. 85, 89.

<sup>5</sup> **Unwarranted interference with bidders by county attorney** in foreclosure sale of land will be grounds for setting same aside, where he ceased

under a mortgage without the consent of the assignee of the mortgage.<sup>1</sup>

It has been said that a deed executed by a master, where the property was sold after he filed his report, is void, and of course will be set aside upon proper showing of the facts to the court.<sup>2</sup> The supreme court of Nebraska, in the case of *Symms v. Nixon*,<sup>3</sup> say that a modified decree of foreclosure, including property not described in the original decree, without any notice of the petition for the modified decree being given to the adverse party, is a nullity in so far as it changes the original decree; and a sale thereunder will be set aside. And the supreme court of Missouri, in the case of *Findley v. Findley*,<sup>4</sup> where a conveyance to the defendant had been set aside because fraudulent and void against creditors, a trust deed given by such defendant after the acquisition of title under foreclosure of a smaller trust deed and the trustee's sale were held fraudulent, and the enforcement of the mortgage perpetually enjoined, and the plaintiff was allowed to redeem by paying the debts secured by the original mortgage.

§ 536a. Same—When not set aside.—A sale under a

bid by reason thereof, and the land was sold at a sum materially below its value and below the amount that would have been bid. *Aldrich v. Lewis*, 28 Neb. 502; s. c. 44 N. W. Rep. 735.

<sup>1</sup> As to who may foreclose see full discussion, *Ante*, §§ 74, 75, 77.

In *Minnesota* a foreclosure of and sale under a mortgage, made by the mortgagee, who had assigned the mortgage, without the consent of the assignee, although the record title had not been transferred, will be set aside at the suit of the assignee, promptly brought upon discovering the facts, as against judgment creditors of the mortgagor who have redeemed and who had notice of the assignment at the time of redeeming, although the judgment was docketed before the as-

signment was recorded. See: *Cutler v. Clementson*, 67 Fed. Rep. 409.

In *Missouri* a sale will be set aside when made by the trustee under a power in a trust deed, without authority from the owner of the debt to commence the proceeding, and without notice to a junior mortgagee whom the trustee had agreed to notify, and when it was known both to the trustee and the purchaser that the owner of the land was negotiating a loan to pay off both debts. *Cassady v. Wallace*, 102 Mo. 575; s. c. 15 S. W. Rep. 138.

<sup>2</sup> *McBride v. Gwynn*, 33 Fed. Rep. 402.

<sup>3</sup> 29 Neb. 404; s. c. 45 N. W. Rep. 680.

<sup>4</sup> 93 Mo. 493; s. c. 6 S. W. Rep. 369; 12 West. Rep. 3:2

decree of foreclosure of a mortgage will be set aside in those cases where there has been an abuse of discretion by the officer making the sale; but not unless substantial injury to the mortgagor or his assignee is made to clearly appear.<sup>1</sup> It has been said that a sale under a trust deed will not be set aside because advertised while the debtor was absent from the city, unless it was done with a fraudulent purpose;<sup>2</sup> and a sale will not be set aside because of an agreement between two persons, who attended for the purpose of bidding for the property, to purchase the same together, where the sale is made to them jointly;<sup>3</sup> nor because the court appointed a guardian *ad litem* for some of the minor defendants, and upon such guardian's answer in denial defaulted such minors and rendered a decree against them without evidence;<sup>4</sup> nor because there was collusion between the owners of the equity of redemption and the purchaser to obtain the estate relieved of the claims of the plaintiff, where there is no allegation that the mortgagee was in collusion with the purchaser and the owners;<sup>5</sup> nor because there were few bidders;<sup>6</sup> nor because the sale was not made at the front door leading to the court room, where the trust deed provided for a sale "at the front door of the court house,"<sup>7</sup> and there are three front doors, the sale having been made in front of one of them in full view of all the others;<sup>8</sup> nor because the sale is made upon credit,

<sup>1</sup> See: *Nix v. Williams*, 110 Ind. 234; s. c. 11 N. E. Rep. 36; 8 West. Rep. 872. See: *Ante*, § 528a.

<sup>2</sup> *Routt v. Milner*, 59 Mo. App. 50.

<sup>3</sup> *Coudert v. DeLogerot*, 30 N. Y. Supp. 114; s. c. 62 N. Y. S. R. 26.

<sup>4</sup> *Cosby v. Powers*, 137 Ind. 694; s. c. 37 N. E. Rep. 321.

<sup>5</sup> *Austin v. Hatch*, 159 Mass. 198; s. c. 34 N. E. Rep. 95.

<sup>6</sup> *Anderson v. White*, 2 App. Cas. D. C. 408; s. c. 22 Wash. L. Rep. 159.

<sup>7</sup> See: *Ante*, §§ 479, 479a.

<sup>8</sup> *Martin v. Barth*, 4 Colo. App. 346; s. c. 36 Pac. Rep. 72; *Maloney*

*v. Webb*, 112 Mo. 575; s. c. 20 S. W. Rep. 683.

The supreme court of Missouri say, in the case of *Maloney v. Webb*, 112 Mo. 575; s. c. 20 S. W. Rep. 683, that a sale under a deed of trust will not be set aside upon the ground that it was not made at the court house door, that it was not an open public sale as provided by the deed of trust, and that the property was not struck off to the highest bidder, where it appears that it was made in the vestibule in front of the court house door, at the usual hour and in the usual manner of public sales at that

or part credit, when it should have been for cash;<sup>1</sup> nor because the debtor was ill at the time the sale was made, and died soon thereafter;<sup>2</sup> nor because of inaccuracies of recital in the published notice, where such inaccuracies are in no way prejudicial to the parties or the purchaser;<sup>3</sup> nor because of inadequacy of price;<sup>4</sup> nor because of the offer of an increase of price alone;<sup>5</sup> nor because of the

place, and that the property was not then struck off to the highest bidder on account of the interposition of plaintiff, who seeks to have the sale set aside, in order that he might make his bid good.

<sup>1</sup> See: *Ante*, §§ 480, 482.

Thus it has been said that the fact that a trustee, who is also the mortgagee, in a trust deed authorizing a cash sale, or his agent, gives credit, or has an understanding with the bidder that credit will be given him on part of his bid, while the sale is ostensibly a cash one, to induce the bidder to bid the full amount of the debt secured, will not avoid the sale because in favor of the mortgagor or those claiming under him. *Chase v. Cleburne First Nat. Bank*, 1 Tex. Civ. App. 595; s. c. 20 S. W. Rep. 1027.

And it is held that it is not ground for setting aside a mortgage foreclosure sale of land advertised to be sold for cash, that the sheriff accepted a certified check, instead of requiring a payment to be made in cash, where such check has since been paid. *Sheldon v. Puessner*, 52 Kan. 593; s. c. 35 Pac. Rep. 204.

<sup>2</sup> *Bowles v. Braur*, 89 Va. 466; s. c. 16 S. E. Rep. 356; 16 Va. L. J. 659.

<sup>3</sup> *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281; s. c. 58 N. W. Rep. 695.

<sup>4</sup> *Martin v. Barth*, 4 Colo. App. 346; s. c. 36 Pac. Rep. 72; *Equitable*

*Trust Co. v. Thrope*, 73 Iowa 297; s. c. 34 N. W. Rep. 867; *Anderson v. White*, 2 App. Cas. D. C. 408; s. c. 22 Wash. L. Rep. 159.

The supreme court of Colorado, in the case of *Martin v. Barth*, *supra*, say that sale of property under a trust deed will not be set aside on the ground of insufficiency of the selling price where such price is entirely adequate if the property does not contain coal, and it is entirely a matter of conjecture whether or not it does, resting upon the fact that coal has been found on other land in that neighborhood.

The supreme court of Iowa, say, in the case of the *Equitable Trust Company v. Thrope*, *supra*, that where property is sold on foreclosure subject to redemption, it is not to be expected that there will be competition at the sale, and the sale will not be set aside upon an allegation that the price upon which it was bid off was grossly inadequate.

The court of appeals of the District of Columbia, have held that a sale on foreclosure of a trust deed, of property stated to be worth from \$30,000 to \$35,000, will not be set aside as made for an inadequate price, when the property brought \$20,100. *Anderson v. White*, 2 App. Cas. D. C. 408; s. c. 22 Wash. L. Rep. 159.

<sup>5</sup> See: *Ante*, § 535.

The supreme court of Michigan, in the case of *Page v. Kress*, 80 Mich.

insanity of the mortgagor subsequent to the execution of the mortgage and at the date of the sale,<sup>1</sup> nor because there is at the time of the sale a depression in business, or financial stringency, affecting the price of lands;<sup>2</sup> or because the times are hard and there is a scarcity of money, or that the property would sell for more at a later period;<sup>3</sup> nor because of the misfortune of the mortgagor, such as a visit of the grasshopper plague,<sup>4</sup> or the inability of the mortgagor to obtain money due and payable;<sup>5</sup> nor because of the failure of the master in foreclosure to file a duplicate certificate of purchase for record as required by statute;<sup>6</sup> nor because sold for a larger sum than the amount due on the mortgage;<sup>7</sup> nor on the ground that the person ap-

85; s. c. 44 N. W. Rep. 1052, say that a resale of mortgaged property will not be ordered upon offer of an increase of price alone, when the property has not been sold at a sacrifice; and the fact that a person is willing to give \$1,000 for property worth \$900 is not a sufficient ground for granting a resale.

<sup>1</sup> Laughlin v. Hibben, 129 Ind. 5 s. c. 27 N. E. Rep. 753; Prevost v. Roediger, 10 N. Y. Supp. 812; s. c. 32 N. Y. S. R. 1101.

**Insanity of the mortgagor subsequent to the making of a mortgage** and failure to appoint a guardian for him, are insufficient to set aside a judgment of foreclosure, when there is no defense to the mortgage and no tender of payment; especially is this the case where there has been a subsequent judgment of possession and the purchaser bought in good faith. Laughlin v. Hibben, 129 Ind. 5; s. c. 27 N. E. 753.

**The supreme court of New York**, in the case of Prevost v. Roediger, 32 N. Y. S. R. 1101; s. c. 10 N. Y. Supp. 812, say that a sale of property upon mortgage foreclosure will not be set aside be-

cause of insanity of the mortgagor at the date of the sale, where the affidavits fail to show with any definite particularity when the insanity commenced, and the mortgagor ably conducted his business for two years after the sale.

<sup>2</sup> Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 231; s. c. 58 N. W. Rep. 695.

<sup>3</sup> Anderson v. White, 2 App. Cas. D. C. 408 (1894); s. c. 22 Wash. L. Rep. 159.

<sup>4</sup> Palmer v. McCormick, 30 Fed. Rep. 82.

<sup>5</sup> Anderson v. White, 2 App. Cas. D. C. 408 (1894); s. c. 22 Wash. L. Rep. 159.

<sup>6</sup> **This objection is not available to a defendant as grounds of objection to the sale**, as the design of the statute is to notify persons who are interested in, but not connected with, the proceedings as parties. McPherson v. Wood, 52 Ill. App. 170.

<sup>7</sup> It is said by the supreme court of California, in the case of Savings & Loan Soc. v. Burnett, 106 Cal. 514; s. c. 39 Pac. Rep. 922, that a sale under a power in a deed of trust for a larger sum than the amount due, is



pointed to make the sale was styled in the decree "commissioner," instead of "master," when the authorities and duties prescribed in the appointment are appropriate to the function given;<sup>1</sup> nor because the person bidding in the property is not the one reported to have bought it;<sup>2</sup> nor because of a perversion of the power in the instrument to improper purposes;<sup>3</sup> nor because a resident defendant was served only by publication, which did not state the character of the action, in the absence of any allegation that such defendant was not also personally served with legal process;<sup>4</sup> nor because there has been a subsequent settlement;<sup>5</sup> nor because there has been a taxation of excessive costs.<sup>6</sup>

The supreme court of Illinois, in the case of *Ritchie v. Judd*,<sup>7</sup> say that a sale under a power contained in a mortgage will not be set aside because its holder was one of the firm of real estate brokers who had agreed with the mortgagor to sell for him at private sale, when the purchaser had no notice of such relations.

It seems that where one desirous of acquiring title to

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valid in the absence of the proof of fraud, or that the property or rights of the grantor or his assignee are injuriously affected, or that bidders were deterred from attending the sale.

<sup>1</sup> *Mann v. Jennings*, 25 Fla. 730; s. c. 6 So. Rep. 771.

<sup>2</sup> Particularly when it is shown that the latter actually became the purchaser, or was substituted for the bidder by the defendant's procurement. *Mann v. Jennings*, 25 Fla. 730; s. c. 6 So. Rep. 771.

<sup>3</sup> **Perversion of power**—Thus it has been said by the supreme court of the state of Rhode Island, in the case of *Holland v. Citizens' Savings Bank*, 16 R. I. 734; s. c. 19 Atl. Rep. 654; 8 L. R. A. 533, that a sale under a power in a mortgage will not be enjoined and set aside on the ground of a perversion of the power to im-

proper purposes, where the mortgagee is acting within the letter of his power, unless the perversion is very clearly shown.

<sup>4</sup> *Cosby v. Powers*, 137 Ind. 694; s. c. 37 N. E. Rep. 321.

<sup>5</sup> **The supreme court of Iowa** say in the case of *Jacobs v. Snyder*, 82 Iowa 754; s. c. 48 N. W. Rep. 806, that a decree of foreclosure and a sale of land thereunder will not be set aside when it appears that a subsequent settlement was had between the parties of all the matters alleged as reasons for setting aside the decree and sale, and there is no proof of abuse of fiduciary relations, or of fraud.

<sup>6</sup> **The remedy of the defendant is by motion to retax costs**, in such a case, *Smith v. Foxworthy*, 39 Neb. 214; s. c. 57 N. W. Rep. 994.

<sup>7</sup> 137 Ill. 453; s. c. 27 N. E. Rep. 682.



land purchases a supposed lien upon a portion of the property already decreed to be sold to enforce a trust deed, his subsequent purchase of the entire tract under the decree will not, on that account, be set aside.<sup>1</sup> And it is said that where, pending an action to establish an equitable lien on land, certain notes secured by mortgages on part of the land are transferred by the defendants to the plaintiff, which the latter agrees to collect and apply, the fact that the agreement is not filed nor the suit dismissed until a sale of the land under the mortgage will not render the sale invalid as against the owners of the land, who bought subject to and agreed to assume the mortgage.<sup>2</sup>

The New Jersey court of chancery, in the case of *New York Life Insurance Company v. Murphy*,<sup>3</sup> hold that a foreclosure sale of three separate parcels will not be set aside because a ten-foot strip forming one of them was first sold under a second mortgage, and notice then given that the purchaser of the second under the first mortgage might have it at the price brought, and the third strip was sold separately, where the bidders are not shown to have bid less than they would otherwise have done, and there was no request that the third parcel be sold with the others.

§ 536b. Same—In case of community property.—It is said, in the case of *Johnson v. Richmond Beach Improvement Company*,<sup>4</sup> that a sale under foreclosure of a mortgage upon community property is not invalidated because service upon the wife was made by delivering a copy to her husband, as the husband is the manager or trustee of the property representing both himself and the wife. In this case the husband and wife lived in the then territory of Washington, where they purchased land, giving a mortgage thereon for a part of the purchase money; thereafter domestic difficulties arose, and they separated and left the state. Thereafter the husband returned to Washington, now be-

<sup>1</sup> *Speck v. Pullman Palace Car Co.*, 121 Ill. 33; s. c. 12 N. E. Rep. 213; 9 West. Rep. 771.

<sup>2</sup> *Sawyer v. Campbell*, 130 Ill. 186; s. c. 22 N. E. Rep. 458.

<sup>3</sup> 25 Atl. Rep. 381.

<sup>4</sup> 63 Fed. Rep. 493 (1894).

come a state, and was served with process, both for himself and his wife, in foreclosure proceedings. The wife did not appear in the case, and the property was decreed sold. After the sale of the property a divorce was granted, on the application of the husband, by a Dakota court. The former wife thereafter applied to redeem the property from the foreclosure sale on the ground of her community interest in the property, setting up the claim that she was not bound by the foreclosure decree, because the service of process was not a legal service, as the place at which the service was made was not her actual place of abode at the time. The court say: "On the face of the record, the service was regular and legal, and the court appeared to have acquired jurisdiction of all the parties defendant; and, to upset that judicial sale, it is necessary for the court to admit evidence alienate to impeach the validity of the record of a court of general and superior jurisdiction. The court is not inclined to permit that to be done, unless the equity of the plaintiff is so strong, and her legal right to do this is so clear, as to admit of no doubt. All the people have an interest in preserving the veracity of public records, and upholding titles acquired by judicial sales. It is subversive of justice to permit titles in which no defect can be discovered by an inspection of the record to be ripped up and invalidated by proceedings commenced long subsequent. It is my opinion that the sheriff's return of service, as to the fact of the place where service was made being the usual place of abode of the defendant is not conclusive on the parties. That is a matter of which he cannot have such personal knowledge as to be able to give such evidence in his certificate that it ought to be regarded as conclusive; but I think the intent of the law is fulfilled when the return of the sheriff is so far true that the place at which service was made upon the absent defendant is the legal place of abode, and that is the case here. The person to whom the papers were delivered for this complainant was her husband. He was the person to whom the title to this property had been conveyed, and in whose name it stood upon the record. He was vested by the law of Washington territory with the control and

management of the community property. He had a right to represent, not only himself, but his wife and the community, in the management of that property; and parties having a lien upon the property, and a right to bring a foreclosure suit, could not be prevented from exercising that right by the absence of the wife from the territory, or by concealment, so that personal service could not be made on her." The court says that until the legal disruption of the family the home of her husband was her legal place of abode, because a wife's legal home is with her husband, and for that reason the service there was lawful, and gave the court jurisdiction to render the decree of foreclosure.

§ 536c. **Same—Sale under agreement.**—It has been held by the supreme court of Iowa<sup>1</sup> that a sale of mortgaged premises upon a decree of a court not having jurisdiction to make such sale, consented to by all the parties, and in effect a sale under the agreement, will not be set aside because of a notice that the court had no power to issue executions for the sale of real estate, and that it is the purpose of the party giving it at once to levy on the property, in consequence of which a person who had agreed to advance moneys to some of the bondholders to buy in the property withdrew from his arrangement.

§ 536d. **Same—Defective notice.**—A sale on mortgage foreclosure will not be set aside merely because of defective notice of sale. Thus it has been held by the supreme court of Nebraska,<sup>2</sup> that a foreclosure sale will not be vacated for a mere inaccuracy of the recitals in the published notice, which were in no way prejudicial to the parties or the purchaser. The supreme court of Maryland in the case of *Chilton v. Brooks*,<sup>3</sup> say that the non-observance of a custom among auctioneers to place notices upon the doors or in the windows of houses for sale, stating the time and place of sale, is not sufficient to justify a court in setting aside a sale

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<sup>1</sup> *International Trust Co. v. Keokuk Electric Street R. Co.*, 90 Iowa 90; Harner, 40 Neb. 281; s. c. 58 N. W. Rep. 695.

s. c. 57 N. W. Rep. 712.

<sup>3</sup> 16 Atl. Rep. 273. See: s. c. 71

<sup>2</sup> *Nebraska Loan & Trust Co. v. Md.* 445; 18 Atl. Rep. 868.

made under a power in a mortgage.<sup>1</sup> The supreme court of Kansas, in the case of *Green v. Carson*,<sup>2</sup> say that a foreclosure sale of lands will not be set aside at the instance of the mortgagor, where the notice of the sale was correctly published for the requisite time, except that in two successive issues the figure "9," representing the day of the month when the sale would occur, was turned upside down, where the alteration was caused or procured to be made by the mortgagor for the purpose of avoiding the sale. It is said in the case of *Ritchie v. Judd*,<sup>3</sup> that a sale under a power of sale given by a mortgage, which provides for notice by publication, will not be set aside because of an arrangement to prevent the mortgagor from having notice of the sale, when the notice required by the mortgage was given and the purchaser was not a party or privy to such arrangement.

§ 536e. Same—Auctioneer's statement.—The court of appeals for the District of Columbia, in the case of *Anderson v. White*,<sup>4</sup> say that a statement by the auctioneer upon a sale on foreclosure of a trust deed, of the value of the improvements on the lot since the mortgage was given as \$3,000, instead of \$8,000, is not ground for setting aside the sale, where it was made under an honest mistake, and the representatives of the mortgagor present made no attempt to correct it, and it is not probable that proposed purchasers were influenced thereby.

The supreme court of Nebraska, in the case of *Norton v. Taylor*,<sup>5</sup> say that the doctrine of *caveat emptor* applies to a foreclosure sale, notwithstanding the fact that the purchaser is told by the sheriff and clerk that if he buys the land he will get a clear and perfect title thereto free from liens, and such statements are untrue, as it is his duty to examine the title, and not rely upon their statements. Such facts are

<sup>1</sup> See: *Post*, § 800.

<sup>2</sup> 50 Kan. 625; s. c. 32 Pac. Rep. 380.

<sup>3</sup> 137 Ill. 453; s. c. 27 N. E. Rep. 682.

<sup>4</sup> 2 App. Cas. D. C. 408 (1894); s. c. 22 Wash. L. Rep. 159.

<sup>5</sup> 35 Neb. 466; s. c. 53 N. W. Rep. 481; 18 L. R. A. 88.

not ground, therefore, upon which to base a motion to vacate and set aside the sale.

§ 536f. Same—Defective title and prior incumbrance.—The fact that the title is defective can not be taken advantage of by the mortgagor to have the sale set aside and a resale ordered. Thus it has been held by the supreme judicial court of Kentucky that a writ of *habere facias* cannot be resisted by a mortgagor after a judgment of foreclosure and sale has been ordered and the land sold, on the grounds that a third party holds a lien on the land which is superior to the lien of the mortgage.<sup>1</sup> And the supreme court of Illinois, in the case of *Ritchie v. Judd*,<sup>2</sup> say that a mortgagor who has refused to produce the evidence necessary to show his title to be paramount to an outstanding claim of title cannot have a sale under the mortgage set aside because, on account of such outstanding claim, the property did not sell for as much as a perfect title should have brought.

In the case of *Norton v. Taylor*<sup>3</sup> it is said that the purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on the ground of defective title or because of prior incumbrances, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the record discloses.

§ 536g. Same—In case of homestead.—The question of the liability of a homestead to sale on mortgage foreclosure has already been fully discussed.<sup>4</sup> It only remains to speak regarding the setting aside of sales had under decrees of foreclosure of mortgages where the homestead is included among the mortgaged property. The supreme court of Iowa, in the case of *Blake v. McCash*,<sup>5</sup> say that a decree of foreclosure and sale of a homestead will not be

<sup>1</sup> *Milliken v. Piles*, 24 S. W. Rep. 604; s. c. 15 Ky. L. Rep. 584.

<sup>2</sup> 137 Ill. 453; s. c. 27 N. E. Rep. 682.

<sup>3</sup> 35 Neb. 466; s. c. 53 N. W. Rep. 481; 18 L. A. R. 88.

<sup>4</sup> See: *Ante*, § 514.

<sup>5</sup> 91 Iowa 544; s. c. 60 N. W. Rep. 127.



set aside for uncertainty of description, and on the plea that the court reformed the instrument without authority, where the answer admits that the mortgage covers the homestead, and the mortgage describes the land as lots 21 and 22 in a specified block in a given city, although there was no lot 22 in the sub-division of such block including lot 21 as originally recorded, but it was subsequently put on in pencil by the deputy county auditor. But the Texas court of civil appeals, in the case of *Williams v. Lumpkin*,<sup>1</sup> say that a mortgagor who, after executing a mortgage upon several pieces of property, including his homestead, obtains from the mortgagee a release of the homestead, is not guilty of culpable negligence in failing to appear and answer and set up the release in an action by the administrator of the mortgagee's estate to foreclose the mortgage, where the citation does not describe the land so as to advise him that a foreclosure of the mortgage upon the homestead is sought, and he fails to defend because he has no defense in regard to the land, and believes the release of the homestead to have been written on the back of the mortgage, and is sick at the time the foreclosure suit was brought.

§ 536h. **Same—In case of non-resident defendant.**—It is said that in the case of a non-resident defendant a decree of foreclosure and sale is not invalidated by a mistake as to their residence, in the proceedings for service of process by publication, where reasonable diligence and good faith have been exercised.<sup>2</sup> And by the supreme court of Illinois, in the case of *Connely v. Rue*,<sup>3</sup> it is said that a decree of foreclosure cannot be impeached because the affidavit as to the non-residence of certain of the defendants, being attached to the bill, was not filed by a separate file mark and separately registered in the face of the clerk's certificate of mailing of the notice of publication made by him, and the adjudication of the court of the filing of an affidavit of publication thereunder.

<sup>1</sup> 26 S. W. Rep. 103, writ of error denied in 86 Tex. 641; s. c. 26 S. W. Rep. 493.

<sup>2</sup> *Connely v. Rue*, 148 Ill. 207; s. c. 35 N. E. Rep. 824.

<sup>3</sup> 148 Ill. 207; s. c. 35 N. E. Rep. 824.



§ 536i. Same—In case of railroad company.—In the case of a foreclosure of a mortgage on railroad property, one who purchases the property in trust for the bondholders cannot rid himself of the trust position without the consent of such bondholders, although if they fail to comply with the arrangements under which the sale was made, such sale may be set aside and a new sale ordered free from any trust.<sup>1</sup> But the supreme court of the United States say that holders of second mortgage bonds cannot avoid a sale under the first mortgage on the ground that it was announced improperly that bonds of a certain issue would be received in payment, where they did not bid at the sale or in any way manifest a willingness to free the property from the first mortgage debt.<sup>2</sup>

§ 536j. Same—In cases of usury.—The effect of usury on a mortgage, and the defense of usury, have already been fully discussed.<sup>3</sup> The supreme court of Minnesota, in the case of *Scott v. Austin*,<sup>4</sup> say the fact that a mortgage void for usury has been foreclosed by sale under a power, the purchaser having notice of the usury, does not prevent the mortgagor from avoiding the sale and the mortgage, by an action for that purpose. And it is said that an assignee of the decree in foreclosure, taking with knowledge of the facts, is chargeable to the same extent that his assignor would be; and execution of the decree may be restrained after assignment thereof.<sup>5</sup>

§ 537. Irregularity in conduct of sale.—Irregularities in the conduct of a sale under a decree of mortgage foreclosure may be grounds for setting the sale aside and ordering a re-sale where they are such as to materially affect the interests of parties to the action. But it is said that a purchaser at a trustee's sale is conclusively charged with notice of

<sup>1</sup> *Indiana I. & I. R. Co. v. Swan-*  
*nell*, 54 Ill. App. 260.

<sup>2</sup> *Cunningham v. Macon B. R. Co.*  
156 U. S. 400; bk. 39 L. ed. 471;  
s. c. 61 Am. & Eng. R. Cas. 661; 15  
Sup. Ct. Rep. 361.

<sup>3</sup> See: *Ante*, §§ 344, 344a.

<sup>4</sup> 36 Minn. 460, 464; s. c. 32 N. W.  
Rep. 89, 864.

<sup>5</sup> *Rose v. Birkholm* (N. J. Ch.  
1887); 9 Atl. Rep. 746; s. c. 8 Cent.  
Rep. 566.

irregularities by the trustee in executing the power of sale.<sup>1</sup> The supreme court of Missouri, in the case of *Long v. Long*,<sup>2</sup> say that an irregular sale under a deed of trust operates as an equitable assignment of the deed and the notes secured thereby. It is thought that where there are irregularities in a foreclosure sale, the proper remedy is by appeal from the order of confirmation.<sup>3</sup>

The supreme court of Washington, in *Parker v. D'Acres*,<sup>4</sup> say that in a case where there were no such errors in a foreclosure sale as would oust the court of jurisdiction, an order confirming the sale concludes inquiry into irregularities attending it. It is thought that irregularities in a foreclosure judgment and sale are waived by a defendant who, after full notice of them, surrenders possession of the premises, for a valuable consideration, to the purchaser at the sale.<sup>5</sup> And the fact that a sheriff who had erroneously sold mortgaged premises as an entirety, contrary to the order of the court, only made a deed for half of it, which he was ordered to sell separately, will not sustain the sale, for the reason that the irregularity will be presumed to have deterred bidders.<sup>6</sup>

The supreme court of Nebraska, in the case of *Miller v. Lanham*,<sup>7</sup> say that a mortgage-foreclosure sale will not be set aside for irregularities or errors not prejudicial to the complaining party, or on the motion of the mortgagor on the ground that the purchaser has not paid off claims adjudged to be prior liens on the property. And it is thought that a judgment confirming a foreclosure sale of lands is rendered merely irregular, and not void, by the fact that the mortgagor's heirs were not made parties to the action, or notified of the commissioner's report, nor of the confirmation thereof; and the proper remedy is a motion

<sup>1</sup> *Stephens v. Clay*, 17 Colo. 489; s. c. 30 Pac. Rep. 43.

<sup>2</sup> 28 S. W. Rep. 69.

<sup>3</sup> *Trilling v. Schumitsch*, 67 Wis. 186; s. c. 30 N. W. Rep. 222.

<sup>4</sup> 1 Wash. St. 190; s. c. 24 Pac. Rep. 192.

<sup>5</sup> *Trilling v. Schumitsch*, 67 Wis. 186; s. c. 30 N. W. Rep. 222.

<sup>6</sup> *Meriwether v. Craig*, 118 Ind. 301; s. c. 20 N. E. Rep. 769.

<sup>7</sup> 35 Neb. 886; s. c. 53 N. W. Rep. 1010.

in the cause to have the judgment vacated, although it be a final judgment.<sup>1</sup>

The supreme court of New York, in the case of *Cole v. Kelly*,<sup>2</sup> say that a general judgment of foreclosure in favor of a second mortgagee, entered upon findings ordering the complaint dismissed as to a purchaser at foreclosure sale under the first mortgage, which cut off the rights of the second mortgagee, although irregular, will not be set aside at the instance of the purchaser, if it has been amended *nunc pro tunc* so as to protect his rights.

It has been held, and the decision is thought to be sound in principle, that a deed executed by a master, where the property was sold after he filed his report, is void.<sup>3</sup> And it is said that a mortgagor cannot be presumed to have waived defects in the sale of the mortgaged property on foreclosure, at which sale he was not present, where he had no knowledge of the irregularity until a short time before commencing the suit to set aside the sale, and the sheriff had withheld the return.<sup>4</sup>

§ 537a. Same—In sale under power.—In the case of a sale under a power in a trust deed long acquiescence in the trustee's sale, where no hour was specified in the notice of sale, cures the defect even if such designation was required by statute, and therefore avoids the irregularity.<sup>5</sup> It is said that a purchaser at a sale under a trust deed providing that the surplus shall be payable to the mortgagor is charged with notice of want of authority in the trustee to agree that the surplus shall be retained by such purchaser and applied on a debt due him from the mortgagor.<sup>6</sup> And it is thought that a grantor in a trust deed, who was present at a sale thereunder, and advised at the time of all the facts, cannot have the sale set aside on an application made nine

<sup>1</sup> *Everett v. Reynolds*, 114 N. C. 366; s. c. 19 S. E. Rep. 233.

<sup>2</sup> 54 Hun (N.Y.) 638; s. c. 8 N. Y. Supp. 131; 28 N. Y. S. R. 370.

<sup>3</sup> *McBride v. Gwynn*, 33 Fed. Rep. 402.

<sup>4</sup> *Meriwether v. Craig*, 118 Ind. 301; s. c. 20 N. E. Rep. 769.

<sup>5</sup> *Meier v. Meier*, 105 Mo. 411; s. c. 16 S. W. Rep. 223.

<sup>6</sup> *Gair v. Tuttle*, 19 Fed. Rep. 193.

years and three months after he was put out of possession in legal proceedings following the sale, where in the mean time the property has greatly increased in value and the rights of purchasers and mortgagees have intervened, where the only ground of attacking the sale is a mere irregularity.<sup>1</sup>

It is said by the supreme court of Missouri, in the case of *Davis v. Hess*,<sup>2</sup> that a resale made by the sheriff under a trust deed authorizing him to sell in case of the trustee's refusal to act, will not be set aside because he made proclamation that the price must be paid in thirty minutes after the first sale, on the ground that his conduct was oppressive, there being no claim that the bidder at the first sale, which was for cash, could have procured the money had a longer time been given.

§ 538. Not set aside because of few bidders.—It is well settled that the fact there were but few bidders at the sale under a mortgage foreclosure, because of inclement weather, or any other reason, is not sufficient cause for the setting aside of the sale and ordering a resale. Thus, in a case where there were but two persons who actually made bids present at a sale on foreclosure under a trust deed, it was held that this was not cause for relief from the sale.<sup>3</sup> In the case of *Chilton v. Brooks*,<sup>4</sup> in the court of appeals of Maryland, one of the exceptions to the ratification of the sale was to the effect that the day on which the sale was made was one of the coldest and most disagreeable of the season, in consequence of which there was no attendance of bidders and no competition. This allegation as to the state of the weather on that day was fully sustained by the proof. It was one of the days of the notorious March "blizzard," when the cold was so exceptionally cold in that latitude as to make it dangerous for persons to be exposed

<sup>1</sup> *Irish v. Antioch College*, 126 Ill. 474; s. c. 18 N. E. Rep. 708.

<sup>2</sup> 103 Mo. 31; s. c. 15 S. W. Rep. 324.

<sup>3</sup> *Anderson v. White*, 2 App. Cas. D. C. 408 (1894); s. c. 22 Wash. L. Rep. 159.

<sup>4</sup> 16 Atl. Rep. 273 (1888).

to it. The parties immediately interested and who attended could not conduct the sale out of doors. They had to enter the house, where there was no fire, and the business was hurried through in the briefest possible time, on account of the intense cold. The courts say: "We think no disinterested and prudent trustee, mindful of his duty to protect the interests of all parties concerned, would have allowed the sale to take place on such a day and under such circumstances. The house, though actually just outside the then city limits, was, practically, a city house on a fashionable avenue leading to the park,—was a valuable and handsome one, recently built,—and we can conceive of no good reason why there was no competition for it, except that the extreme inclemency of the weather prevented bidders from attending the sale. This condition of the weather, in connection with the fact that the house was bid in by the mortgagees at \$1,000 or more below the market value, affords sufficient ground for setting the sale aside, no matter how derelict the mortgagor may have been in complying with the conditions of the mortgage. While it is well settled that mere inadequacy of price, by itself, is not sufficient to set aside a sale unless it be so gross and inordinate as to indicate want of reasonable judgment and discretion, or misconduct or fraud in the trustee, or some mistake or unfairness for which the purchaser is responsible, yet, where it appears that there is any other just cause to doubt the propriety of the sale, it is always a consideration very proper to be viewed by the court in connection with it, that the sale has been made at a reduced price. Such is the rule applicable to sales made by trustees under decrees in equity, and there are strong reasons for applying it with more strictness in cases of sales under mortgages executed in compliance with the provisions of the Code.<sup>1</sup> This law grants exceptional privileges to mortgagees. They, or their assignees, can sell at once upon default without the delay of first obtaining a decree for that purpose ;

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<sup>1</sup> Md. Code, § 64.



and, what is more important, they can become purchasers at their own sales without having their title impeached upon that ground.<sup>1</sup> In this case the appellees availed themselves of this privilege. They were, therefore, bound to act with strict impartiality in regard to the sale. Being both vendors and purchasers, there was greater reason for diligence and effort on their part to obtain the best price, 'and the court is called upon to exercise more care and strictness in passing upon the sale thus made.'<sup>2</sup> For the reasons stated, the order ratifying the sale must be reversed, the sale set aside."

§ 539. **Inadequacy of price—Setting aside sale for.**—A sale under a judgment in foreclosure proceedings may be set aside when the price bid for the property is so inadequate as to work injustice to the parties, although the proceedings have been regular and the sale fairly made,<sup>3</sup> and an order setting aside such sale is binding upon all the parties, including the bidder, although it was made without notice to him.<sup>4</sup>

§ 539a. **Same—When sale not set aside for.**—The general rule is that mere inadequacy of price brought by mortgaged premises on sale under a decree of foreclosure, is not sufficient grounds for setting aside the sale and ordering a resale, in the absence of any showing of fraud, collusion, unfairness, or oppression,—unless so gross as necessarily to raise the inference of fraud or imposition;<sup>5</sup> or in the absence of evidence tending to show bad faith, unfairness in the conduct of the sale, the deterring of bidders, an undue advantage taken of the ignorance or weakness of the persons whose property rights are affected by the sale, or other circumstances tainting the transaction with

<sup>1</sup> Md. Code, art. 64, § 13.

<sup>2</sup> *Loeber v. Eckes*, 55 Md. 3; *Horsey v. Hough*, 38 Md. 130; *Hubbard v. Jarrell*, 23 Md. 66.

<sup>3</sup> *State ex rel. Kunz v. Campbell*, 5 S. D. 636; s. c. 60 N. W. Rep. 32.

<sup>4</sup> *Id.*

<sup>5</sup> *Harlin v. Nation*, 126 Mo. 97; s. c. 27 S. W. Rep. 330.



fraud, and entitling the parties injuriously affected to equitable relief.<sup>1</sup>

<sup>1</sup> *Hudgens v. Morrow*, 47 Ark. 515; s. c. 2 S. W. Rep. 104; *Neel v. Carson*, 47 Ark. 421; s. c. 2 S. W. Rep. 107; *Fry v. Street*, 44 Ark. 502; *Glide v. Dwyer*, 83 Cal. 477; s. c. 23 Pac. Rep. 706; *Central Pac. R. Co. v. Creed*, 70 Cal. 497; s. c. 11 Pac. Rep. 772; *Bowman v. Ash*, 36 Ill. App. 115; *Equitable Trust Co. v. Sharpe*, 73 Iowa 297; s. c. 34 N. W. Rep. 867; *Fitzgerald v. Kelso*, 71 Iowa 731; s. c. 29 N. W. Rep. 943; *Sigerson v. Sigerson*, 71 Iowa 476; s. c. 32 N. W. Rep. 462; *Tootle v. Taylor*, 64 Iowa 629; s. c. 21 N. W. Rep. 115; *Fowler v. Kruntz*, 54 Kan. 622; s. c. 38 Pac. Rep. 808; *Babcock v. Canfield*, 36 Kan. 437; s. c. 13 Pac. Rep. 787. *Capital Bank of Topeka v. Hnntoon*, 35 Kan. 577; s. c. 11 Pac. Rep. 369; *Barlow v. McClintock* (Ky. 1889), 11 S. W. Rep. 29; s. c. 10 Ky. L. Rep. 894; *Harris v. Gunnell* (Ky. 1888), 9 S. W. Rep. 376; *Black v. Steele* (Ky. 1887), 6 S. W. Rep. 23; *Bean v. Hoffendorfer*, 84 Ky. 685; s. c. 2 S. W. Rep. 556; *Garritee v. Popplein*, 73 Md. 322; 20 Atl. Rep. 1070; *Marsh v. Sheriff* (Md. 1888), 14 Atl. Rep. 664; 12 Cent. Rep. 887; *Prestman v. Mason*, 68 Md. 78; s. c. 11 Atl. Rep. 764; *Austin v. Hatch*, 159 Mass. 198; s. c. 34 N. E. Rep. 95; *Clarke v. Simmons*, 150 Mass. 357; s. c. 23 N. E. Rep. 108; *King v. Bronson*, 122 Mass. 122; *Farmers' Bank of Grass Lake v. Quick*, 71 Mich. 534; s. c. 39 N. W. Rep. 752; *Brown v. Brown*, 64 Mich. 75; s. c. 31 N. W. Rep. 34; affirmed, 64 Mich. 82; s. c. 32 N. W. Rep. 663; *Johnson v. Cocks*, 37 Minn. 530; s. c. 35 N. W. Rep. 436; *Coolbaugh v. Roemer*, 30

Minn. 424; s. c. 21 N. W. Rep. 472; *Harlin v. Nation*, 126 Mo. 97; s. c. 27 S. W. Rep. 330; *Maloney v. Webb*, 112 Mo. 575; s. c. 20 S. W. Rep. 683; *Routt v. Milner*, 57 Mo. App. 50; *Klein v. Vogel*, 11 Mo. App. 211; *Miller v. Lanham*, 35 Neb. 886; s. c. 53 N. W. Rep. 1010; *New York Life Ins. Co. v. Murphy* (N. J. Ch. 1892), 25 Atl. Rep. 381; *Coudert v. De Logerot*, 30 N. Y. Supp. 141; s. c. 62 N. Y. S. R. 26; *McEwen v. Butts*, 20 N. Y. Supp. 503; s. c. 43 N. Y. S. R. 312; *Provost v. Roediger*, 10 N. Y. Supp. 81; s. c. 32 N. Y. S. R. 1101; *Weaver v. Lyon* (Pa. 1886), 5 Atl. Rep. 782; s. c. 3 Cent. Rep. 263; *Evans v. Maury*, 112 Pa. St. 300; s. c. 3 Atl. Rep. 850; 3 Cent. Rep. 137; *Klein v. Glass*, 54 Tex. 37; *Lallace v. Fisher*, 29 W. Va. 512; s. c. 2 S. E. Rep. 775; *Maxwell v. Newton*, 65 Wis. 261; s. c. 27 N. W. Rep. 32; *Graffam v. Burgess*, 117 U. S. 180; bk. 29 L. Ed. 839; s. c. 6 Supp. Ct. Rep. 686; 18 Fed. Rep. 251; 10 *Id.* 216; *Smith v. Black*, 115 U. S. 308; bk. 29 L. ed. 398; s. c. 6 Supp. Ct. Rep. 50; *Wheeler v. McBlair*, 5 App. Cas. D. C. 375; s. c. 27 Wash. L. Rep. 153; *Fidelity Trust and Safety Vault Co. v. Mobile St. R. Co.*, 54 Fed. Rep. 26; *Davis v. McGee*, 28 Fed. Rep. 867; *In re Ewing* 16 Fed. Rep. 753; *In re Third National Bank*, 4 Fed. Rep. 775. See: *Post*, § 539b.

**Gross inadequacy** is said to be sufficient grounds for setting aside a sale made under a decree of foreclosure and sale or other quasi judicial sale. See: *In re Palmer*, 13 Fed. Rep. 870; *In re Lloyd*, 11 Fed. Rep. 586; *Blackburn v. Salem R. Co.*, 3 Fed. Rep. 689.

Nor will a sale be set aside and a resale ordered upon the mere expression of opinion that the property on a resale

Particularly is this the case where the inadequacy in price is accompanied by fraud, oppression, or other unfairness in the conduct of the sale. See *Devine v. Harkness*, 117 Ill. 145; s. c. 7 N. E. Rep. 54; *Fitzgerald v. Kelso*, 71 Iowa 731; s. c. 29 N. W. 943; *Weir v. Travelers' Ins. Co.*, 32 Kan. 325; s. c. 4 Pac. Rep. 267; *O'Fallon v. Klopton*, 89 Mo. 284; s. c. 1 S. W. Rep. 302; *Hubbard v. Taylor*, 49 Wis. 68; s. c. 4 N. W. Rep. 1066; *Kemp v. Hein*, 48 Wis. 32; s. c. 3 N. W. Rep. 831; *Graffam v. Burgess*, 117 U. S. 180; bk. 29 L. ed. 839; s. c. 6 Sup. Ct. Rep. 686; 18 Fed. Rep. 251; 10 *Id.* 216; *United States v. Vestal*, 12 Fed. Rep. 59.

Slight additional circumstances are required to set aside a sale where there is gross inadequacy of price. *Davis v. McGee*, 28 Fed. Rep. 867. In this case Mr. Justice Brewer, who presided over the United States circuit court for the eastern district of Missouri at the time this decision was rendered, in the course of his opinion says: "It is conceded that mere inadequacy of price at a judicial sale, openly and fairly conducted, is not ground for setting aside such sale, unless it be so gross as to shock the conscience. It is contended, however, that where there is a great inadequacy trifling irregularities affecting the conduct of the parties to the suit are sufficient to justify a court of equity in taking possession of the matter and setting aside the sale. I have no doubt that that is true; and that if the conduct of the plaintiff in the suit, or the purchaser at the sale, is, even in perhaps minor matters, such as to be oppressive, such as to prevent a

further price being realized, such as to mislead the defendant, or anything of that kind, the sale ought not to stand, and the court will seize hold of these and set it aside.

In California a foreclosure sale will not be set aside for mere inadequacy in the price for which the property was sold. *Central P. R. Co. v. Creed*, 70 Cal. 497; s. c. 11 Pac. Rep. 772. And the fact that the mortgagee purchased the property (See: *Ante*, § 520) at much less than its actual value is not of itself sufficient to show fraud and justify setting the sale aside. *Glide v. Dwyer*, 83 Cal. 477; s. c. 23 Pac. Rep. 706.

In Kansas, in a case where the sale upon foreclosure was fairly and regularly conducted, and the land sold to a *bona fide* purchaser, the court held, on an application to set aside such sale, upon the facts, that the inadequacy of the price, and the unexplained failure of the agent of the mortgagee to bid at the sale, were insufficient to defeat the title of the purchaser. *Babcock v. Canfield*, 36 Kan. 437; s. c. 13 Pac. Rep. 787.

In Kentucky a sale on foreclosure will not be set aside where it was properly advertised, and a large number of persons were present at the sale, and it appears that the property brought a fair price. *Barlow v. McClintock* (Ky), 11 S. W. Rep. 29; s. c. 10 Ky. L. Rep. 894.

In Maryland a foreclosure sale will not be set aside for mere inadequacy of price, in favor of defendants who failed to avail themselves of an order extending the time for the payment of the mortgage debt, and also

would bring a much higher price;<sup>1</sup> it must be shown affirmatively that it will sell for a larger price.<sup>2</sup> A resale will not be ordered upon a mere guaranty of an advance price;<sup>3</sup> or upon a mere statement founded only upon information that some of the bondholders deterred other proposed buyers, not named from bidding, by creating an impression that they were going to bid a much larger sum for the property, where in fact they only clothed their committee with a discretion to buy the property at any price limited only by such sum.<sup>4</sup> Neither will a resale be ordered upon a mere conjecture or surmise that if the property had been offered for

of an order giving them the benefit of a resale on the payment of a specified sum into court. *Garitee v. Popplein*, 73 Md. 322 ; s. c. 20 Atl. Rep. 1070.

In Minnesota it is held that where there is neither irregularity in the sale, nor fraud on the part of the mortgagee, and especially where there is a right of redemption from the sale, mere inadequacy of price is not of itself ground for setting aside a sale under the power in a mortgage. *Johnson v. Cocks*, 37 Minn. 530; s. c. 35 N. W. Rep. 436.

In New Jersey a foreclosure sale will not be disturbed for inadequacy of price because an advance offer of \$1,000 over the price of \$19,475 is made, where the only bidder who has been produced was authorized to only pay \$20,000, and the property was well advertised and sold under favorable circumstances. *New York Life Ins. Co. v. Murphy* (N. J. Ch., 1892), 25 Atl. Rep. 381.

In New York a foreclosure sale to a *bona fide* purchaser will not be set aside for mere inadequacy of price, in a suit brought to set aside the sale for fraud, proof of which has failed. *McEwan v. Butts*, 48 N. Y. S. R. 312; s. c. 20 N. Y. Supp. 503. And the same court say, in the case of *Coudert*

*v. De Logerot*, 62 N. Y. S. R. 26; s. c. 30 N. Y. Supp. 114, that a foreclosure sale of real property will not be set aside upon the ground of the inadequacy of the purchase price of \$437,000, where the largest amount, which as shown by the moving papers, anyone has offered to bid at a resale is \$450,000. The court say, in the course of the opinion, that a sale of property under foreclosure will not be set aside upon evidence of the refusal by the mortgagor of an offer largely in excess of the bid, and of an opinion previously expressed by the attorney for the mortgagor and mortgagee that the property was worth an amount largely in excess of the sum bid, the purchaser being neither the mortgagor nor the mortgagee.

<sup>1</sup> *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.*, 54 Fed. Rep. 26.

<sup>2</sup> *Farmers' Bank of Grass Lake v. Quick*, 71 Mich. 534; s. c. 39 N. W. Rep. 752.

<sup>3</sup> *Harris v. Gunnell* (Ky. 1888), 9 S. W. Rep. 376.

As to what advance sufficient to justify setting aside sale and ordering a resale. See: *Ante*, § 535.

<sup>4</sup> *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.*, 54 Fed. Rep. 26.

sale at another season it would have brought a better price, when it is not shown that any person with capital or means was prevented from attending.<sup>1</sup>

§ 539b. **Same—When sale set aside for.**—A sale under a mortgage foreclosure will be set aside for inadequacy of price brought where there have been irregularities materially affecting the interest of the parties, or any fraud, or undue advantage, or the price is so grossly inadequate as to shock the conscience.<sup>2</sup> But in some states a resale on foreclosure will be ordered for mere inadequacy in price, upon the objecting party paying the cost and expenses of the sale already made.<sup>3</sup>

Sales under a decree in a mortgage foreclosure have been set aside in the following cases: Where the evidence showed an uncertainty as to whether proper notices of sale were ever made;<sup>4</sup> or where the property was struck off to the plaintiff on the first bid offered, for a grossly inadequate price, and the sale was immediately confirmed without notice to the owner of the equity of redemption, who appeared immediately after the sale was made and confirmed, and stated in the presence of plaintiff's counsel that he would bid a specified amount sufficient to secure the plaintiff, and was not told that the sale had been confirmed;<sup>5</sup> where the property was sold for an inadequate price, and the plaintiff's attorney had been the attorney for a defendant holding a life estate, and had told her husband that he could represent her and her infant children, who were entitled in remainder, and had stated that the first bid

<sup>1</sup> *Garitee v. Popplein*, 73 Md. 322; s. c. 20 Atl. Rep. 1070.

<sup>2</sup> The New York court of appeals say that a foreclosure sale in bulk for \$1,000, of corporate property worth \$60,000, consisting of a large number of articles, when the property was not present or visible to the persons attending the sale, in the absence of any of the officers of the mortgagor corporation, will be set

aside either in a court of law or equity. *Cassery v. Witherbee*, 119 N.Y. 522; s. c. 30 N. Y. S. R. 92; 23 N. E. Rep. 1000.

<sup>3</sup> *Brown v. Farley* (N. J. Ch. 1886), 4 Atl. Rep. 79; s. c. 3 Cent. Rep. 373.

<sup>4</sup> *Harris v. Gunnell* (Ky. 1888), 9 S. W. Rep. 376.

<sup>5</sup> *Fowler v. Kruntz*, 54 Kan. 622; s. c. 38 Pac. Rep. 808.

would be enough to pay the mortgage debt, and that there would be no deficiency judgment entered, and the holder of such judgment bid in the property for the plaintiff;<sup>1</sup> where the plaintiff's attorney, anticipating that an engagement would prevent his attendance, instructed a deputy sheriff to bid the amount of the judgment, but the latter neglected to do so, and the property was sold for less than one-third of the judgment. In a case where the defendant failed to attend the sale because he relied upon the promise of the plaintiff's attorney to bid the full amount of the judgment, so that there would be no deficiency; the purchaser knew of the intention to bid that amount; an order to show cause the next day why the sale should not be set aside, has been held to have been obtained on the day of sale.<sup>2</sup>

The New Jersey court of chancery, in the case of *Schuling v. Lintner*,<sup>3</sup> say that in a case where the petitioner, understanding little English, lived upon the mortgaged property, and process was served upon her, but she depended upon notice of sale being posted on the house, and the property, worth \$2,000, was sold as an entirety for \$1,300, she is entitled to be relieved from the sale.

§ 539c. **Same—In case of sale under a power.**—Mere inadequacy of price will not invalidate a sale at auction under a power contained in a mortgage, unless it is so gross as to indicate bad faith or a want of reasonable judgment and discretion in the mortgagee or trustee.<sup>4</sup> A sale for one-half the estimated value of the mortgaged premises is not such inadequacy;<sup>5</sup> particularly where there is no

<sup>1</sup> *Bonnett v. Brown*, 59 Hun (N. Y.) 619 mem.; s. c. 36 N. Y. S. R. 320; 13 N. Y. Supp. 395.

<sup>2</sup> *Haynes v. Backman* (Cal. 1892), 31 Pac. Rep. 745.

<sup>3</sup> 43 N. J. Eq. (16 Stew.) 444; s. c. 11 Atl. Rep. 153; 9 Cent. Rep. 491.

<sup>4</sup> *Bowman v. Ash*, 36 Ill. App. 115; *Austin v. Hatch*, 159 Mass. 198; s. c. 34 N. W. Rep. 95; *Clark v. Simmons*,

150 Mass. 357; s. c. 23 N. E. Rep. 108; *Maloney v. Webb*, 112 Mo. 575; s. c. 20 S. W. Rep. 683; *Lallace v. Fisher*, 29 W. Va. 512; s. c. 2 S. E. Rep. 775.

<sup>5</sup> *Austin v. Hatch*, 159 Mass. 198; s. c. 34 N. E. Rep. 95; *Maloney v. Webb*, 112 Mo. 575; s. c. 20 S. W. Rep. 683; *Lallace v. Fisher*, 29 W. Va. 512; s. c. 2 S. E. Rep. 775.



allegation that an adjournment of the sale would have resulted in the realization of a higher price.<sup>1</sup>

§ 539d. **Same—When objection to be taken.**—An objection to the validity of a mortgage sale for inadequacy of price can only be heard on exceptions thereto, and will not support a bill in equity to set it aside, after its ratification by the court.<sup>2</sup> It is a well settled rule of procedure in all courts that objections to a sale under a decree of foreclosure because of inadequacy of the price brought must be promptly made; they are regarded as waived by delay.<sup>3</sup> Thus it is said in *Provost v. Roedeger*<sup>4</sup> that inadequacy of price paid on a foreclosure sale is not established by the fact that four years afterwards the purchaser sold the lands for considerable more than he paid for them, where the interest on the purchase money, and taxes on the property after the purchase, would, with the bid, nearly or quite reach that sum. And it is said, in the case of *Wheeler v. McBlair*,<sup>5</sup> that a mortgage sale will not be set aside for inadequacy of price when not complained of for more than ten years and no excuse is given for the laches.

§ 541. **Accident and surprise grounds for setting sale aside.**—Surprise is one of the grounds for setting aside a sale in a mortgage foreclosure; but it is thought that where the sale is fair and regular upon its face, it will not be set aside on the ground of surprise, unless the party claiming to have been surprised was without fault or negligence, and promptly offered to return the purchase money.<sup>6</sup>

Thus, the supreme court of California, in the case of *Central Pacific Railroad Company v. Creed*,<sup>7</sup> denied a

<sup>1</sup> *Austin v. Hatch*, 159 Mass. 198; s. c. 34 N. E. Rep. 95.

<sup>2</sup> *Marsh v. Sheriff* (Md. 1888), 14 Atl. Rep. 664; s. c. 12 Cent. Rep. 887.

<sup>3</sup> *Marsh v. Sheriff* (Md. 1888), 14 Atl. Rep. 664; 12 Cent. Rep. 664. See: *Provost v. Roedeger*, 10 N. Y. Supp. 812; s. c. 32 N. Y. S. R. 1101; *Wheeler v. McBlair*, 5 App. Cas. D. C. 375; s. c. 23 Wash. L. R. 153;

*Wiltzie's Mortgage Foreclosure* (2d ed.), § 546.

<sup>4</sup> 10 N. Y. Supp. 812; s. c. 32 N. Y. S. R. 1101.

<sup>5</sup> 5 App. Cas. D. C. 375; s. c. 23 Wash. L. Rep. 153.

<sup>6</sup> *Central P. R. Co. v. Creed*, 70 Cal. 497; s. c. 11 Pac. Rep. 772.

<sup>7</sup> 70 Cal. 497; s. c. 11 Pac. Rep. 772.



motion to set aside a sale on the ground of surprise where the plaintiff seeking to set it aside knew of the time and place of the sale, but neglected to give any instructions in reference thereto until the preceding day, when it telegraphed its agent and wrote the sheriff, offering to purchase the property for the amount of the judgment and costs, and instructed them to bid that amount; but neither telegram nor letter was received by the parties until after the sale, which was made for a less price than offered by the plaintiff, and plaintiff received the purchase money and kept it for five months.

§ 542. **Fraud and misconduct.**—Fraud and misconduct, where injury results, will be grounds for setting aside a sale made under a decree in foreclosure proceedings. What amounts to fraud or misconduct is to be determined by the facts in each particular case; but it is thought the simple fact that a mortgagee purchased the mortgaged property at foreclosure at much less than its actual value, is not of itself sufficient to show fraud.<sup>1</sup> Also that a foreclosure sale cannot be set aside for an incorrect appraisement unless for fraud, unfairness, or mistake other than a mere erroneous opinion as to the value of the property.<sup>2</sup>

The supreme court of Illinois, in the case of *Ritchie v. Judd*,<sup>3</sup> say that the validity of a mortgage foreclosure sale will not be affected by an agreement between the holder of a mortgage and a third person, that the mortgage shall be foreclosed and that the latter shall bid a certain sum upon the sale, not imposing any obligation upon the former to strike the property off for that amount, but leaving the sale open to free competition. And the supreme court of Tennessee, in the case of *Kansas City Land Company v. Hill*,<sup>4</sup> hold that where a person procures a trustee or a creditor to foreclose a trust deed and buys at the sale, made openly

<sup>1</sup> *Glide v. Dwyer*, 83 Cal. 477; s. c. 23 Pac. Rep. 706.

<sup>3</sup> 137 Ill. 453; s. c. 27 N. E. Rep. 682.

<sup>2</sup> *Harris v. Gunnell* (Ky.), 9 S. W. Rep. 376. See: *Ante*, §§ 473, 473a.

473b. U

<sup>4</sup> 87 Tenn. 589; s. c. 11 S. W. Rep. 797; 5 L. R. A. 45.

and fairly, in strict accordance with the terms of the trust, is not evidence of fraud against the devisee of the grantor, where such purchaser is ignorant of a will, and believes the land had descended to the heir-at-law, whose vendee proposes to convey to him upon such sale being made by the trustee, and where the sole object in procuring such foreclosure is to exhaust the creditor's remedies against the land, and this, although the vendee of the heir had assumed the payment of the incumbrance.

§ 547. **Excusable mistakes as grounds for setting sale aside.**—An excusable mistake by a party in interest is always a ground for setting aside a mortgage foreclosure sale. Thus, it has been held that where a person bid at a sale with the expectation that she was entitled to the proceeds of the sale, being the sole next of kin and heir, when in fact the sale was subject to another claim, she may be allowed to surrender her deed, and have the sale set aside.<sup>1</sup>

§ 548. **Terms imposed.**—The court in exercising its discretion and setting aside a sale, may impose such terms as are just and reasonable. The payment of the costs of the sale are usually required. Thus, it is said by the supreme court of New York, that the payment of the costs of a sale and adjournment may be made a condition of setting aside a sale on foreclosure while an appeal to the New York court of appeals is pending, if an order requiring the payment of the cost of adjourning the sale is not obeyed, and one of the sureties to the undertaking on appeal has not qualified, although an order has been granted extending the time to qualify beyond the time of sale, if it contains no provision adjourning the sale.<sup>2</sup>

§ 549. **Effect on purchaser of order setting sale aside.**—By bidding at the sale and becoming the purchaser of the land sold on mortgage foreclosure a person submits himself to the jurisdiction of the court, and is bound by all subsequent orders made in the case, although not a

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<sup>1</sup> Hinton v. Leigh, 102 N. C. 28;  
s. c. 8 S. E. Rep. 890.

<sup>2</sup> Stephens v. Humphreys, 46 N. Y.  
S. R. 646; s. c. 19 N.Y. Supp. 25.

party to the suit. This being the case, an order setting aside a sale for any of the various causes justifying the court in so doing, will be binding upon the purchaser, notwithstanding the fact that the order was made without notice to him.<sup>1</sup> And the supreme court of New York, in the case of *Wood v. Kroll*,<sup>2</sup> say that in those cases where the judgment of foreclosure is vacated, and the purchaser's title to the premises under the sale annulled, the money received by him from a party in possession should be applied in reduction of the amount due on the mortgage.

§ 550. Setting sale aside for benefit of infants.—Where the property of infant owners has been sacrificed through the negligence or misapprehension of their natural or statutory guardians, they will be relieved by a resale. Thus, the supreme court of New York, in the case of *Monzani v. Monzani*,<sup>3</sup> say that where the father of an infant owner of real property, being also tenant by the curtesy, procures paramount liens upon the property to be assigned to his wife, who forecloses and buys in the property for much less than its value, while the infant, by his father's representations, is induced not to protect his interests, the court will, where interests of third persons have not intervened, adjudge the infant to be the owner of the property subject to the estate by the curtesy and the liens, and will require an accounting for the rents and profits.

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<sup>1</sup> *State ex rel. Kunz v. Campbell*, 5 S. D. 636; s. c. 60 N. W. Rep. 32.

<sup>2</sup> 27 Abb. (N. Y.) N. C. 67; s. c. 15 N. Y. Supp. 683.

<sup>3</sup> 43 Hun (N. Y.) 328.

## CHAPTER XXVII.

### CONFIRMING SALE AND ENFORCING PURCHASE.

CONFIRMATION OF SALE—ENFORCING BID AGAINST PURCHASER—DEFECTS IN TITLE—MARKETABLE TITLE—WHEN PURCHASER WILL BE EXCUSED FROM COMPLETING PURCHASE.

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| <p>§ 553. Every foreclosure sale must be confirmed.</p> <p>553a. Same—When to be made.</p> <p>553b. Same—Ratification by mortgagor.</p> <p>555. Report of officer making sale—Effect of error in.</p> <p>556. Effect of confirmation of sale.</p> <p>558. Enforcing sale against purchaser.</p> <p>559. Proceedings where purchaser refuses or neglects to complete his purchase.</p> <p>561. When the bidder will be excused from completing his purchase.</p> | <p>§ 562. Defects of title unknown to purchaser at time of sale.</p> <p>563. Defects of title existing prior to the mortgage under foreclosure.</p> <p>564. When purchaser presumed to know condition of title.</p> <p>570. Purchaser entitled to marketable title.</p> <p>572. Rights of assignee of purchaser's bid.</p> <p>573. Rights of purchaser to have sale completed.</p> |
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§ 553. Every foreclosure sale must be confirmed.—The general rule is that a sale under a decree of foreclosure is not complete until the officer making the sale has reported the same to the court and the sale has been confirmed.<sup>1</sup> It is also a general rule, observed in all the states, that before the court will make an order confirming the sale it must be satisfied that the highest and best price has been obtained; and where the property sold for its fair cash value, the proceedings regular, and the sale fair and free from fraud, the presumption is that the statute has been complied with.<sup>2</sup> And it is said that those mortgagees who have obtained a regular sale for a fair price of the mortgaged premises under their foreclosure decree, are entitled to a confirmation and

<sup>1</sup> See full discussion in Wiltsie's *Mortg. Forec.* (2d ed.) § 553, and *Post*, § 555.

(1348)

<sup>2</sup> *Guarantee Trust & S. D. Co. v. Jenkins*, 40 N. J. Eq. (13 Stew.) 451; s. c. 2 Atl. Rep. 13; 2 Cent. Rep.

173.

satisfaction of their decree, regardless of any equities which a purchaser from the mortgagor may have acquired in the mortgaged premises *pendente lite*.<sup>1</sup> The supreme court of Kansas, in the case of *Kline v. Camp*,<sup>2</sup> say that where the mortgaged lands are offered for sale on mortgage foreclosure, under an appraisement, and no sale is made because of a want of bidders, whereupon an alias order is procured and a second appraisement improperly obtained, under which the land is sold for less than two-thirds of the first appraisement, which sale is set aside on the ground that the second appraisement was a nullity, and another appraisement ordered, under which the land is sold for more than two-thirds of the last appraisement, the latter sale will be properly confirmed.

§ 553a. **Same—When to be made.**—All sales made under a decree in mortgage foreclosure should be passed upon and either confirmed or set aside at the term of court when the sale is made; yet it has been said that an order of confirmation of a foreclosure sale may be made at an adjourned term of the court, and at any reasonable time after the return of the order of sale, even though the return is made before the expiration of the full period permitted for that purpose.<sup>3</sup> And there is a decision by the Ohio Supreme Court holding that a motion to set aside or confirm a sale, made on the last days of the term during which the sale of the land is made, may properly be heard at the following term.<sup>4</sup> But an order confirming a sale of land under a decree of foreclosure, after the sale has been vacated and a resale properly made and confirmed, is void.<sup>5</sup>

In the case of *Belter v. Lyon*,<sup>6</sup> in opposition to the confirmation of a foreclosure sale, on affidavit that the parties

<sup>1</sup> *Pendleton v. Spear*, 56 Ark. 194; s. c. 19 S. W. Rep. 578.

<sup>2</sup> 49 Kan. 114; s. c. 30 Pac. Rep. 175.

<sup>3</sup> *Nebraska Loan & T. Co. v. Hamer*, 40 Neb. 281; s. c. 58 N. W. Rep. 695.

<sup>4</sup> *Niles v. Parker*, 49 Ohio St. 370; s. c. 34 N. E. Rep. 735. See: *Ante*, § 529.

<sup>5</sup> *State ex rel. Kunz v. Campbell*, 5 S. D. 636; s. c. 60 N. W. Rep. 32.

<sup>6</sup> 102 N. Y. 725; s. c. 7 N. E. Rep. 821; 3 Cent. Rep. 658.

agreed to the sale as a matter of form in order to cure a defective title, which allegations were denied, the court, upon the strength of a letter written before the sale, by an attorney representing both parties, held that a real sale was intended, but that if the plaintiff became purchaser, and within one year the mortgage debt should be paid, the plaintiff should reconvey, and the defendant was not liable to account for rents.

§ 553b. **Same—Ratification by mortgagor.**—It is thought that the purchaser at a mortgage foreclosure sale may acquire a valid title without formal confirmation by the court by a ratification of the sale and purchase by the mortgagor, in which case the mortgagor will be estopped to claim as against the purchaser. It has been held that a sale of land upon a mortgage foreclosure is ratified by a payment subsequently made by the mortgagor upon the balance of the judgment, and acceptance of a receipt stating that the payment was made upon the amount remaining unpaid after crediting that realized by the sale.<sup>1</sup> And the supreme court of Minnesota, in the case of *Jellison v. Halloran*,<sup>2</sup> say that where a grantee from a purchaser at a void foreclosure sale takes and holds possession in good faith, the assent and acquiescence of the mortgagor may be implied from the attendant circumstances; such as the abandonment of the premises by him, and the neglect to assert any claim thereto after notice of the possession of such purchaser.

§ 555. **Report of officer making sale—Effect of error in.**—It is the duty of the officer making the sale under a mortgage foreclosure to report the same faithfully to the court,<sup>3</sup> and a failure to do this will be just ground for setting aside or amending the report, where parties interested are injured thereby. But it has been held that where the plaintiff in an action to foreclose a mortgage purchases at

<sup>1</sup> *Zable v. Masonic Sav. Bank* (Ky. 1891, 16 S. W. Rep. 588

<sup>2</sup> 44 Minn. 199; s. c. 46 N. W. Rep. 332.

<sup>3</sup> See: *Ante*, § 553.



the sale, a mistake made by the sheriff in entering of record the amount of his bid binds the purchaser, and he cannot be heard to deny the correctness of the record to the prejudice of a redeeming junior lienholder.<sup>1</sup>

§ 556. **Effect of confirmation of sale.**—The effect of a confirmation of a sale under a decree in foreclosure proceedings, is (1) to do away with all objections because of errors and irregularities, and all exceptions to the order of confirmation; (2) to divest the mortgagor and his privies of title to the land, and (3) to pass the title to the purchaser, upon the proper execution and due delivery of a deed thereto, in compliance with the order of the court. Thus the supreme court of the state of Nebraska, in the case of *Hooper v. Castetter*,<sup>2</sup> say that a purchaser of property at a mortgage foreclosure sale, who, after its confirmation, accepts a conveyance of such property, executed in pursuance of the sale, its confirmation, and the order of the court, and who obtains an order for a writ of possession therefor, thereby waives all errors and irregularities which may have occurred in making such sale, and all objections and exceptions to the order of confirmation.

The mortgagor, though deprived of his title to the land sold, will be protected in his interests therein to the extent of requiring the price for which the land was sold, after paying the costs of the action and sale, to be applied in discharge of the mortgage debt. And in those cases where a mortgagor ratifies a sale of a part of the mortgaged premises by the mortgagee, he is entitled to have the purchase price applied upon the mortgage debt, although the mortgagee claims that the conveyance is defective.<sup>3</sup>

§ 558. **Enforcing sale against purchaser.**—A bid by the purchase of land sold under a decree in foreclosure is a contract which becomes binding upon the bidder after acceptance by the court, and cannot be withdrawn or

<sup>1</sup> *Morrison v. Spencer*, 72 Iowa, 445; s. c. 34 N. W. Rep. 200.

<sup>3</sup> *Lyon v. Dees*, 101 Ala. 700; s. c. 14 So. Rep. 564.

<sup>2</sup> 45 Neb. 67; s. c. 63 N. W. Rep.

changed except under such circumstances as would justify the rescission or reformation of other contracts.<sup>1</sup> Should the bidder fail or refuse to complete his bid, he may be proceeded against and specific performance of the contract of purchase compelled.<sup>2</sup> And it has been said that a mortgagee who purchased land at his own sale under license of the court, is chargeable with his bid where a resale is afterwards had, by consent of the parties, without the court's license, for a less amount.<sup>3</sup>

The supreme court of Maryland, in the case of *Bowdoin v. Hammond*,<sup>4</sup> hold that a mortgagee who purchases the mortgaged property at a foreclosure sale is not required, where the property is destroyed by fire after the sale, before its ratification by the court, to pay the full amount of his bid upon allowing the sale to be ratified without having it diminished by the damage done by the fire, the amount of which is paid by the insurance company, where the property is insured for the express purpose of indemnifying the mortgagee against loss.

§ 559. **Proceedings where purchaser refuses or neglects to complete his purchase.**—In those cases where a purchaser at a foreclosure sale refuses or neglects to complete his purchase, he may either be proceeded against directly to compel a specific performance of his contract,<sup>5</sup> or the property may be re-offered for sale and the delinquent bidder charged with the deficit, if any.<sup>6</sup> The

<sup>1</sup> *Nebraska Loan and T. Co. v. Hamer*, 40 Neb. 281; s. c. 58 N. W. Rep. 695.

<sup>2</sup> *Boornin v. Tucker*, 51 N. J. Eq. (6 Dick.), 135 (1893); s. c. 26 Atl. Rep. 456.

**Release of a purchaser upon foreclosure sale**, of one division of a railroad from his bid, which he made with reasonable hope of completion, and failed to complete only from lack of funds, is no reason for releasing an organization committee from a bid upon the other division, which they had failed to

complete merely because they concluded the price was high, where unsecured creditors will derive an advantage from the contract to purchase deliberately made by such company. *Central Trust Co. v. Cincinnati, J. & M. R. Co.*, 58 Fed. Rep. 500.

<sup>3</sup> *Whitehead v. Whitehurst*, 108 N. C. 458; s. c. 13 S. E. Rep. 166.

<sup>4</sup> 79 Md. 173 (1894); s. c. 28 Atl. Rep. 769.

<sup>5</sup> See: *Ante*, § 558.

<sup>6</sup> *Whitehead v. Whitehurst*, 108 N. C. 458; s. c. 13 S. E. Rep. 166.

supreme court of Utah, in the case of *Kershaw v. Dyer*,<sup>1</sup> say that on failure of a bidder at a foreclosure sale to comply with his bid on one of two lots offered for sale, the court may order a sale of the other lot, without either confirming the first sale or ordering a resale of the first lot at the risk of the delinquent bidder.

§ 561. When bidder will be excused from completing his purchase.—The general rule is that the purchaser at a foreclosure sale is entitled to receive a marketable title,<sup>2</sup> and that when such can be given he will be compelled to complete his purchase. But a purchaser at a foreclosure sale under a mortgage will be relieved from the purchase, where the title decreed to be sold does not correspond with the title as stated in the mortgage and pleadings.<sup>3</sup> And a New York court has held that a purchaser at a mortgage foreclosure sale will not be required to complete the purchase, where the title of the mortgagor came through the will of a descendant who devised the land in remainder and one of whose executors conveyed to the mortgagor, and neither the remainderman nor the heirs were made parties to the foreclosure suit, and it is doubtful whether the mortgagor ever had title.<sup>4</sup>

The supreme court of New York, in the case of *Crocker v. Gallner*,<sup>5</sup> say that a purchaser at foreclosure sale will not be compelled to complete his purchase, although a good title can be given, at the instance of the owner of the equity of redemption, where, pending a motion to compel completion of the purchase, the mortgage was bought by one who had commenced suit and filed a *lis pendens* to enforce a contract made by such owner restrictive of the use of the mortgaged premises, and the motion was thereupon withdrawn so far as the plaintiffs were concerned.

<sup>1</sup> 6 Utah 239; s. c. 24 Pac. Rep. 621.

<sup>2</sup> See: *Post*, § 570.

<sup>3</sup> *Mitchell v. Kinnard*, (Ky. 1895), 29 S. W. Rep. 309.

<sup>4</sup> *Phillips v. Wilcox* (N. Y. Super. Ct.) 12 Misc. (N. Y.) 382; s. c. 33

N. Y. Supp. 561; 67 N. Y. S. R. 350.

<sup>5</sup> 47 N. Y. S. R. 887; s. c. 20 N. Y. Supp. 17; appeal dismissed in 135 N. Y. 662; s. c. 32 N. E. Rep. 114; 4 Silv. N. Y. 650; 48 N. Y. S. R. 569.

And the same court, in the case of *Bradley v. Leahy*,<sup>1</sup> say that where the terms of sale under foreclosure of a second mortgage state that the sale is made subject to the first mortgage, when in fact the first mortgage has already been foreclosed and a decree of sale entered, the purchaser will not be compelled to complete the purchase, although the attorney and auctioneer testify that at the time of the sale a statement was made by the auctioneer that a prior mortgage was then in process of foreclosure, which statement the purchaser states that he did not hear. But in the case of *O'Connor v. Felix*,<sup>2</sup> it is held that a purchaser at a foreclosure sale will not be relieved of his bid on the ground that the mortgagor has served on him an affidavit that he was not served with summons, where the referee who was appointed to take the testimony finds that he was served, because the only way in which the question of service may be attacked is by a direct motion in the action, on which the same result must follow.

§ 562. Defects of title unknown to purchaser at time of sale.—A purchaser at a foreclosure sale will not ordinarily be compelled to complete his purchase in those cases where there are defects in the title to the premises, which were unknown to him at the time of the purchase. But the supreme court of New York, in the case of *Van Rensselaer v. Bull*,<sup>3</sup> hold that a purchaser at a mortgage foreclosure sale in which the mortgage, judgment, and terms of sale read aloud before the sale described a tract of land, together with the interest of the mortgagor in the bed of a creek forming one of the boundaries of such tract, is not entitled to be relieved of his purchase because of a defect in the title to what was the bed of such creek at the time the mortgage was executed and has since become made land. And the same court, in the later case of *Mutual Life Insur-*

<sup>1</sup> 54 Hun (N. Y.) 390; s. c. 7 33 N. Y. Supp. 1074; 67 N. Y. S. R. N. Y. Supp. 461; 27 N. Y. S. R. 777.

321.

<sup>3</sup> 17 N. Y. Supp. 117; s. c. 43 N.

<sup>2</sup> 87 Hun (N. Y.) 179 (1895); s. c. Y. S. R. 340.

ance *Company v. Voorhis*,<sup>1</sup> say that upon foreclosure the mortgagee of upland does not obtain title to land under water in front of the upland, granted to the mortgagor by the state after the execution of the mortgage, and not included in the description of the mortgage.<sup>2</sup>

§ 563. Defects of title existing prior to the mortgage under foreclosure.—Defects in the title to the land sold which existed at the time the mortgage under foreclosure was given, will not entitle the bidder to be released from his bid, because he had constructive notice of such defects. Thus it is said by the supreme court of South Carolina, in the case of *Carolina Savings Bank v. McMahon*,<sup>3</sup> that the purchaser on a foreclosure sale is not relieved from his duty to complete his purchase by defects in the probate of a deed constituting part of the chain of title, where the original conveyance, with proof of the handwriting of the grantor and subscribing witnesses, and that they are all dead, is tendered him before his rejection of the title.

§ 564. When purchaser presented a known condition of title.—The purchaser at a mortgage foreclosure sale simply buys the interest the mortgagor had in the land; he takes the risk as to all claims affecting the title to the property which existed prior to the execution of the mortgage. Hence, it has been held that a purchaser at a mortgage foreclosure sale cannot refuse to complete his purchase on account of defective title or prior incumbrances, where the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale is made, as he is chargeable with notice of the material facts contained therein.<sup>4</sup> He is also bound by a condition that the title shall commence with a certain conveyance, and that the prior title, whether appearing in any abstracted document or not, shall not be required to be investigated

<sup>1</sup> 71 Hun (N. Y.) 117; s. c. 24 N. Y. Supp. 529; 53 N. Y. S. R. 874.

<sup>2</sup> See: *Ante*, § 256p.

<sup>3</sup> 37 S. C. 309; s. c. 16 S. E. Rep. 31.

<sup>4</sup> *Hooper v. Castetter* (Neb.), 63 N. W. Rep. 135.



or objected to, upon an application for the return of his deposit, although he has discovered *aliunde* that there is a question whether the grantor in such conveyance had more than a life estate.<sup>1</sup> It was held in the case of *Calder v. Jenkins*,<sup>2</sup> that a purchaser at a sale under foreclosure of a prior mortgage in which the wife of the mortgagor did not join is not relieved from liability to complete his purchase by the fact that the deed of the referee upon a sale under a second mortgage, in which she did join, is not recorded, where the sale was confirmed upon a report of sale stating all the facts.

§ 570. Purchaser entitled to marketable title.—The general rule is that a purchaser at a foreclosure or other judicial sale is entitled to a marketable title, and will not be compelled to accept any other; yet he must be content with such title as the proceedings show that he will get.<sup>3</sup> Thus it is held that a purchaser at a sale upon foreclosure of a mortgage is entitled to be relieved from his purchase when the grantees of the mortgaged premises holding under unrecorded deeds, and their tenant in possession at the commencement of the foreclosure action, were not made parties thereto.<sup>4</sup> Where there is an error in a deed and

<sup>1</sup> *Re Marsh*, 64 L. J. Ch. (N. S.) 255.

<sup>2</sup> 16 N. Y. Supp. 797; s. c. 42 N. Y. S. R. 38.

<sup>3</sup> *Boorum v. Tucker*, 51 N. J. Eq. (6 Dick.) 135; s. c. 26 Atl. Rep. 456.

**Nebraska rule—The doctrine of caveat emptor.**—The Nebraska supreme court holds that the doctrine of *caveat emptor* applies to a foreclosure sale, even though the purchaser is informed by the sheriff and the clerk of the court that if he buys the land he will get a clear and perfect title thereto free from all liens, although such statements are untrue. This is based on the ground that it is the duty of the intending purchaser to examine the title, and not to rely upon the statements of others, even though they

be officers of the court. Consequently such misstatements by these officers is not ground for a motion to vacate and set aside the sale. *Norton v. Taylor*, 35 Neb. 466; s. c. 53 N. W. Rep. 418; 18 L. R. A. 88. And a purchaser at a mortgage foreclosure sale will not be relieved from his bid on the ground of defective title, or because of prior incumbrances, in those cases where the true condition of the title is fully set out on pleadings and the record of the proceedings under which the sale is made, for the reason that he is chargeable with notice of all such material facts as the record discloses. *Id.*

<sup>4</sup> *Welsh v. Schoen*, 59 Hun (N. Y.) 356; s. c. 36 N. Y. S. R. 538; 13 N. Y. Supp. 71.



mortgage in describing the starting point, it is such a misdescription as renders the title unmarketable, and entitles the purchaser at the foreclosure sale to be relieved from his purchase.<sup>1</sup>

§ 572. **Rights of assignee of purchaser's bid.**—The purchaser at a mortgage foreclosure sale may assign the interest he acquired in the property by reason of his bid, and such assignee will succeed to all the rights and interests the purchaser had. And it has been said that if such purchaser, or his assignee, go into possession of the mortgaged premises with the assent of the mortgagor, under the rights supposed to have been acquired under the foreclosure sale, and, for any reason, the sale is found to be invalid, he will be deemed a mortgagee in possession.<sup>2</sup>

The supreme court of New York, in the case of *Flint v. George*,<sup>3</sup> say that one to whom a purchaser at foreclosure sale assigns his bid after making a payment of ten per cent. upon which the sale was conditioned, and who refuses to complete the sale, upon which the property is resold for sufficient to satisfy the claim without such ten per cent., has no title to the payment which he can assign, as against one to whom the original purchaser assigned his interest in the payment, after the sale.

§ 573. **Rights of purchaser to have sale completed.**—A party who purchases at a mortgage foreclosure sale, where the proceedings are regular, is entitled to have the sale completed. And it has been said by the supreme court of Arizona, in the case of *Bryan v. Kales*,<sup>4</sup> that the title of a purchaser at a sale of land under a mortgage cannot be attacked in a collateral proceeding upon the ground that the sale was had upon a judgment obtained by

<sup>1</sup> *Fitzpatrick v. Sweeney*, 56 Hun (N. Y.) 159; s. c. 9 N. Y. Supp. 219; 3 N. Y. S. R. 525, *affd.* in 121 N. Y. 707 *mem.*

<sup>2</sup> *Rogers v. Benton*, 39 Minn. 39; s. c. 38 N. W. Rep. 765; 12 Am. St. Rep. 613.

<sup>3</sup> 8 N. Y. Supp. 221; s. c. 28 N. Y. S. R. 629.

<sup>4</sup> 31 Pac. Rep. 517 (1892). See: also *Bryon v. Brasius* (Ariz. 1892), 31 Pac. Rep. 519.

the mortgagee against himself as administrator of the mortgagor, and consequently void upon its face, where the mortgagee and administrator, though of the same name, are not shown to be the same person, since the presumption of identity of person from identity of names is overcome by the presumption of the validity of a judgment. In this case it was strongly urged by counsel for the appellant that the fact of the identity does not appear upon the face of the record of the court, inasmuch as it should be presumed alone from the similarity of names, applying the rule of evidence that identity of names is *prima facie* evidence of identity of person. On this point the court say :

“An examination of the authorities will show that this rule of evidence is not one of universal application ; that it grew out of the general presumption in favor of the validity of contracts, the regularity of land titles and the integrity of records ; that wherever its effect would be to negative these general presumptions, the reason of the rule ceases to exist, the rule itself becomes inoperative ; that hence it can have no application to a case like the one at bar, if, indeed, it applies at all to a judgment of a court of record, where the effect of its application would be to impeach and destroy its effect as a valid and binding estoppel of record.”<sup>1</sup>

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<sup>1</sup> Applicable cases are then cited and discussed by the court, among them being *Stevenson v. Murray*, 87 Ala. 442; s. c. 6 So. Rep. 301; *Garwood v. Garwood*, 29 Cal. 515; *Darente v. Sullivan*, 7 Cal. 279; *Prescott v. Tufts*, 7 Mass. 209; *Campbell v. Wallace*, 46 Mich. 320; s. c. 9 N. W. Rep. 432; *Wilson v. Benedict*, 9 Mo. 209; s. c. 2 S. W. Rep. 283.

Distinguishing *Gitt v. Watson*, 18 Mo. 274; and *Jackson v. King*, 5

*Cow.* (N. Y.) 239. The court say that these cases differ materially from the one at bar in this: “That the rule *idem sonans* was invoked therein in aid of land title by showing the identity of a grantee in one instrument to be the same as the grantee in another instrument, or the identity of a patentee of land and the ancestor of one setting up title to the same.

## CHAPTER XXVIII.

### DELIVERING DEED—PASSING TITLE—OBTAINING POSSESSION.

REFEREE'S DEED—ESTATE CONVEYED—REQUISITES OF DEED—TITLE OF PURCHASER—FIXTURES—EMBLEMENTS—RENTS—APPEAL AND REVERSAL—DELIVERY OF POSSESSION—WRIT OF ASSISTANCE—SUMMARY PROCEEDINGS.

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| <p>§ 574. General principles.</p> <p>575. Provisions for letting purchaser into possession.</p> <p>576. Effect and force of referee's deed.</p> <p>577. Estate conveyed and interest passed by referee's deed.</p> <p>577a. Same — Assessments — Condemnation and damage funds.</p> <p>577b. Same — Assignee of mortgage—Purchaser.</p> <p>577c. Same—Bona fide purchaser.</p> <p>577d. Same—Community property.</p> <p>577e. Same—Error and fraud.</p> <p>577f. Same—Emblements and ice.</p> <p>577g. Same—General creditors of mortgagor.</p> <p>577h. Same—Invalid mortgages.</p> <p>577i. Same—Irregularities and defects.</p> <p>577j. Same—Junior liens.</p> <p>577k. Same—Licenses and trusts.</p> <p>577l. Same—"More or less."</p> <p>577m. Same — Mortgaged succession.</p> <p>577n. Same—Obligations of purchasers.</p> <p>577o. Same—Parol trusts.</p> <p>577p. Same—Possession and ejectment.</p> <p>577q. Same—Prior liens — Rights and liabilities.</p> <p>577r. Same—Purchaser at irregular or invalid sale.</p> <p>577s. Same—Rents—Title to.</p> | <p>§ 577t. Same—Riparian mortgages.</p> <p>577u. Same—Subrogation of purchaser.</p> <p>577v. Same—Taxes on land—Liability of purchaser for.</p> <p>577w. Same—Timber—Right to.</p> <p>577x. Same — Usury — Bona fide purchaser.</p> <p>578. Execution and delivery of deed.</p> <p>580. Error in description in mortgage—Correcting in deed.</p> <p>582. Title of purchaser relates back to time of executing mortgage.</p> <p>583. Time for redemption—Effect on title of purchaser.</p> <p>584. All fixtures pass to purchaser under referee's deed.</p> <p>585. Same—Exceptions to the rule.</p> <p>586. All permanent improvements pass under referee's deed.</p> <p>587. All emblements pass under referee's deed.</p> <p>588. Right of purchaser to rents.</p> <p>588a. Same—Accounting for rents and profits.</p> <p>589. Appeal and reversal—Effect on purchaser's title.</p> <p>590. Delivering possession of premises to purchaser.</p> <p>591. Possession obtained by summary process.</p> <p>593. Writ of assistance — When granted.</p> <p>600. Summary proceedings to obtain possession.</p> |
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§ 574. **General principles.**—Immediately the sale is concluded, the officer making the sale may execute and deliver to the purchaser a deed of the premises. It has been said that a sheriff is not liable for delivering a deed upon a sale under foreclosure without collecting the price bid by a junior mortgagee, where a prior mortgagee for the benefit of the mortgagor has purchased the decree and has also purchased the claim of such junior mortgagee, but not the bid.<sup>1</sup> The supreme court of Iowa, in the case of *Hardin v. Iowa Railroad and Construction Company*,<sup>2</sup> say that on foreclosure of a deed of trust on land across which a railroad is constructed, a decree should not except the right of way from the sale, where the deeds for the land, and the trust created therein, make no exception thereof, and the record does not show that there is any right of way through the lands.

§ 575. **Provisions for letting purchaser into possession.**—The decree in foreclosure should provide for letting the purchaser into possession. The New York court of appeals, in the case of *Farmers Loan and Trust Company v. Bankers and Merchants Telegraph Company*,<sup>3</sup> say that a judgment of foreclosure providing that the purchaser shall be entitled to the possession on the production of his deed, and that the mortgagors and their receiver shall join in the deed, necessarily implies that the referee shall give to the purchaser a deed, although not containing any express direction to that effect.

§ 576. **Effect and force of referee's deed.**—It is thought that the deed of a master in chancery, referee, or other officer making the sale in mortgage foreclosure proceedings, executed to a third person, at the request of the real purchaser, vests the title to such land in such third person and his grantee, as against the real purchaser and his heirs.<sup>4</sup>

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<sup>1</sup> *Russell v. Grimes*, 31 Neb. 784; 543; 6 L. R. A. 52; 40 Am. & Eng. s. c. 48 N. W. Rep. 905; aff'g. on rehearing, 27 Neb. 812; s. c. 44 N. W. Rep. 107.

<sup>3</sup> 119 N. Y. 15; s. c. 23 N. E. Rep. 173; 28 N. Y. S. R. 613.

<sup>2</sup> 78 Iowa 726; s. c. 43 N. W. Rep.

<sup>4</sup> *Robertson v. Sayre*, 53 Hun

The supreme court of Missouri, in the case of *Dodson v. Lomax*,<sup>1</sup> say that the inclusion in a sheriff's deed upon foreclosure of a school mortgage, of a lot included in the mortgage, but not sold, is a mistake which will be corrected in equity, where the sheriff was ignorant and the purchaser cognizant thereof.

§ 577. Estate conveyed and interest passed by referee's deed.—The general rule<sup>2</sup> is that a purchaser

(N. Y.) 490; s. c. 25 N. Y. S. R. 449; 6 N. Y. Supp. 649.

The New Jersey Acts of 1881 and 1882, Supp. Rev. 489, 490, which subject mortgaged estates to conditions of redemption in the hands of purchasers at foreclosure sales, being unconstitutional as applied to antecedent mortgages, the purchaser at a sale under proceedings for the foreclosure of a mortgage made prior to these Acts took the estate of the mortgagee unaffected by the conditions of redemption created by those Acts, although at the foreclosure sale, enough was realized to pay the prior mortgage in full, and a small sum upon a second mortgage, which was made after these Acts took effect. *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162; s. c. 16 Atl. Rep. 70; 12 N. J. L. J. 87.

<sup>1</sup> 21 S. W. Rep. 25.

<sup>2</sup> *Gamble v. Caldwell*, 98 Ala. 577; s. c. 12 So. Rep. 424; *Martinez v. Lindsay*, 91 Ala. 334; s. c. 8 So. Rep. 787; *Bryan v. Pinney* (Ariz. 1892), 31 Pac. Rep. 548; *Clyne v. Benicia Water Co.*, 100 Cal. 310; s. c. 34 Pac. Rep. 714; *Robinson v. Thornton*, 102 Cal. 675; s. c. 34 Pac. Rep. 120; *Thorpe v. Kerns*, 83 Cal. 553; s. c. 20 Pac. Rep. 82; 23 *Id.* 691; *Barnard v. Wilson*, 74 Cal. 512; s. c. 16 Pac. Rep. 307; *Myers v. Pierce*, 86 Ga. 786; s. c. 12 S. E. Rep. 978;

*Duesterberg v. Swartzel*, 115 Ind. 180; s. c. 17 N. E. Rep. 155; *Austin v. Bowman*, 81 Iowa 277; s. c. 46 N. W. Rep. 1111; *Levanworth Lodge, No. 2, I. O. O. F. v. Byers*, 54 Kan. 323; s. c. 38 Pac. Rep. 261; *Bailey v. Fanning Orphan School* (Ky. 1890), 14 S. W. Rep. 908; s. c. 12 Ky. L. Rep. 644; *Landreaux v. Louque*, 43 La. An. 234; s. c. 9 So. Rep. 32; *Herman v. Fanning*, 151 Mass. 1; s. c. 23 N. E. Rep. 493; *Chapin v. Freeland*, 142 Mass. 333; s. c. 8 N. E. Rep. 128; 2 N. Eng. Rep. 732; *Mority v. St. Paul*, 52 Minn. 409; s. c. 54 N. W. Rep. 370; *Jellison v. Holloran*, 44 Minn. 199; s. c. 46 N. W. Rep. 332; *Alkinson v. Greaves*, 70 Miss. 42; s. c. 11 So. Rep. 688; *Lanier v. McIntosh*, 117 Mo. 508; s. c. 23 S. W. Rep. 787; *Meier v. Meier*, 105 Mo. 411; s. c. 16 S. W. Rep. 223; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 226; s. c. 29 N. W. Rep. 936; *Henninger v. Herald*, 53 N. J. Eq. (8 Dick.) 674; s. c. 29 Atl. Rep. 190; *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162; s. c. 16 Atl. Rep. 701; *Melick v. Pidcock*, 44 N. J. Eq. (17 Stew.) 25; s. c. 15 Atl. Rep. 3; 13 Cent. Rep. 350; 6 Am. St. Rep. 901; *Baldwin v. Howell*, 45 N. J. Eq. (18 Stew.) 519; s. c. 15 Atl. Rep. 236; 13 Cent. Rep. 362; *Mount v. Manhattan Co.*, 43 N. J. Eq. 25; s. c. 9 Atl. Rep. 114; 3 Cent. Rep. 573;



at a mortgage foreclosure sale acquires all the title and interest in the premises possessed by the

Hiles v. Fisher, 144 N. Y. 306; s. c. 39 N. E. Rep. 337; 63 N. Y. S. R. 705; 43 Am. St. Rep. 762; 30 L. R. A. 325; Townsend v. Thomson, 139 N. Y. 152; s. c. 34 N. E. Rep. 871; Slattery v. Schwbunecker, 44 Hun (N. Y.) 75; Moggats v. Coe, 44 Hun (N. Y.) 31; Hartley v. Meyer, 2 Misc. (N. Y.) 56; s. c. 20 N. Y. Supp. 351; 49 N. Y. S. R. 351; Branford County Lumber Co. v. Dail, 111 N. C. 120; s. c. 15 S. E. Rep. 941; rehearing denied 112 N. C. 350; s. c. 15 S. E. Rep. 350; 17 S. E. Rep. 587; Gill v. Weston, 110 Pa. St. 312; s. c. 1 Atl. Rep. 921; 1 Cent. Rep. 370; Dyer v. Cranston Print Works Co., 17 R. I. 774; s. c. 24 Atl. Rep. 827; *Ex parte* Boyce (S. C. 1894), 19 S. E. Rep. 495; Givins v. Carroll, 40 S. C. 413; s. c. 18 S. E. Rep. 1030; Kirber v. Moody, 84 Tex. 201; s. c. 19 S. W. Rep. 453; Ryan v. Ferguson, 3 Wash. 356; s. c. 28 Pac. Rep. 910; Osborn v. Glasscock, 39 W. Va. 749; s. c. 20 S. E. Rep. 702.

The purchaser of the title of lands sold by virtue of an execution issued upon a decree in an action for the foreclosure of a mortgage takes all the title which the mortgagor had and which was conveyed by such mortgage (Henninger v. Herald, 51 N. J. Eq. (6 Dick.) 74; s. c. 29 Atl. Rep. 190), and of the wife who unites in the mortgage, subject to the rights of each to redeem and to the right of the mortgagor to retain possession for one year from the sale (Duesterberg v. Swartzel, 115 Ind. 180; 17 N. E. Rep. 155; 14 West. Rep. 521); and may recover damages for the breach of the covenant of warranty contained

in the deed conveying the property to the mortgagor. Mygatt v. Coe, 44 Hun (N. Y.) 31.

A purchaser of real property at sheriff's sale under *fieri facias* in foreclosure of a special mortgage can take nothing not described in the mortgage (Jones v. Lake, 43 La. An. 1024; s. c. 10 So. Rep. 204), and the title created by a deed expressly made subordinate to a prior trust deed is extinguished by a sale under the latter deed. Meier v. Meier, 105 Mo. 411; s. c. 16 S. W. Rep. 223.

**A channel or pipe through which water has been furnished** to a ranch, for more than five years, from the mains of a water company, pursuant to an agreement to furnish the same in consideration of certain water rights, constitutes an appurtenance to the ranch; and the right to it, including the flow of water from the main, passes to a purchaser of the ranch upon a foreclosure sale. Clyne v. Benicia Water Co., 100 Cal. 310; s. c. 34 Pac. Rep. 714.

**A purchase from one against whom a remedy is barred by time** entitles the purchaser to stand in as good a position as his vendor. Hence a purchaser at a foreclosure sale of the premises will be protected by the statute. Chapin v. Freeland, 142 Mass. 383; s. c. 8 N. E. Rep. 128; 2 N. Eng. Rep. 732.

**Acquires mortgage interest only where.**—It has been said that one who purchases real property at a foreclosure sale, under an agreement that the title shall vest in him for the purpose of executing a mortgage to one paying part of the purchase money, and as security for the repayment of



mortgagor and mortgagee in the property sold and nothing more.<sup>1</sup> Thus a purchaser under a foreclosure

money advanced by himself, and to convey the premises to another, acquires only a mortgage interest as against the latter. *Van Vleck v. Enos*, 88 Hun (N. Y.) 348; s. c. 34 N. Y. Supp. 754.

**An assignee of a mortgage of desert lands**, made after final proof but before patent, who has purchased the lands upon foreclosure sale, is entitled to file a petition to revive the original judgment on foreclosure, under Idaho Rev. Stat. § 4493, providing for such action by the purchaser of property at a sheriff's sale who fails to recover possession by reason of irregularities or because the property was not subject to execution and sale, where the entry of the mortgagor is cancelled by the land office in proceedings begun before the sale. *Cantwell v. McPherson*, 2 Idaho 1044; s. c. 29 Pac. Rep. 102.

**Cannot be limited to life estate by schedule of bankruptcy.**—It is thought that in those cases where the title conveyed by a trust deed of land, the grantor's whole interest in which was afterwards sold under a decree on a joint petition of the trustee and the mortgagor's assignee in bankruptcy, cannot be limited to a life estate by a statement in the grantor's schedule or in his assignee's original separate petition, that his interest was that of a life estate. *Alkinson v. Greaves*, 70 Miss. 42; s. c. 11 So. Rep. 688.

**Fee in equity of redemption.**—The purchaser of mortgaged premises conveyed in trust, at a sale in a foreclosure suit to which the *cestuis que trust* were parties, acquires the estate of the mortgagor and also the fee in the equity of redemption. *Melick v.*

*Pidcock*, 44 N. J. Eq. (17 Stew.) 25; s. c. 6 Am. St. Rep. 901; 15 Atl. Rep. 3; 13 Cent. Rep. 300.

**Mistake of clerk of court—Effect on purchaser's title and estate.**—The title of a purchaser at a foreclosure sale of lands is not affected by a mistake of the clerk of the court (which was corrected on motion) in entering in the draft of the judgment on the order book the figures \$200 instead of \$2,000, for which the lands were actually sold. *Vissman v. Bryant* (Ky. 1893), 14 Ky. L. Rep. 874; s. c. 21 S. W. Rep. 759.

In New Jersey the title to lands acquired under foreclosure of a mortgage to the sinking fund commissioners of the State of New Jersey is superior to that of a purchaser under a sale made under the "Martin Act" for taxes, some of which became a lien prior and others subsequent to the date of the mortgage, the tax sale being made to satisfy the combined taxes. *Pugh v. Sinking Fund Comrs.*, 53 N. J. L. (24 Vr.) 629; s. c. 23 Atl. Rep. 270.

<sup>1</sup> Thus one who has no title, legal or equitable, to a tract of land, cannot by acts *in pais* confirm the sale of any interest therein made under a decree in chancery; and even a purchaser of the equity of redemption thereof, pending a suit by one claiming title through such sale, is not affected by the acts *in pais* of such stranger to the title. *Brooks v. Kelly*, 63 Miss. 616. And where a man who had taken the title to property in which he had only a one-third interest gave a purchase-money mortgage upon it, and afterwards, upon payment of one-third of the price, obtained a release of an nn-

decree acquires no interest as against an owner of the fee who was not made a party,<sup>1</sup> and a commissioner's deed on a foreclosure sale cannot increase the rights originally granted by the mortgage; nor can the owner of the equity of redemption and other parties to the foreclosure stipulate away the rights of the heirs or legal representatives of the deceased mortgagor.<sup>2</sup>

It is thought that a purchaser at a foreclosure sale is not fixed with constructive notice of an assignment of the equity of redemption in any of the mortgaged property by any of the successive holders of the mortgage, nor is he bound to inquire in regard to it; but all that he is required to do is to ascertain from the record or by inquiring of the mortgagor whether the debt has been paid or the mortgage released.<sup>3</sup> A mortgagor of lands in fee, who had previously conveyed a small piece of the land upon condition that the grantee would erect and maintain a well, with tank, and do other specified things, is estopped, as against the mortgagee, from denying that the latter, who purchased at the foreclosure, is entitled to the whole lot, where, after the well and tank were constructed, it was closed and the tank removed, and the grantee ceased to occupy the land con-

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divided one-third, his interest in that third becomes absolute upon subsequent foreclosure expressly excepting the part released to him. The purchaser at the sale obtains no interest in that third; and deeds to him from the persons originally entitled to the other two-thirds are of no effect. *Central Bank v. Earley* (Pa. 1888), 14 Atl. Rep. 427; s. c. 13 Cent. Rep. 229.

In a case where land was conveyed to the trustee to secure debts, and afterwards a third party took a conveyance of the equity of redemption, and paid off the debts, and then sold the land to a person who took possession. The first vendee then caused the trustee to sell the land under the

terms of the deed in order to get the legal title out of him, and the court held that the purchaser at such sale with full notice of the facts, got no title, and no estoppel arose against the owner of the equity. *Mayo v. Leggett*, 96 N. C. 237; s. c. 1 S. E. Rep. 622.

<sup>1</sup> *Fowler v. Lilly*, 122 Ind. 279; s. c. 23 N. E. Rep. 767; *Watts v. Julian*, 122 Ind. 124; s. c. 23 N. E. Rep. 698.

<sup>2</sup> *Morgan v. Meuth*, 60 Mich. 238; s. c. 27 N. W. Rep. 509.

<sup>3</sup> *Beaufort County Lumber Co. v. Dail*, 112 N. C. 941; s. c. 17 S. E. Rep. 527; 112 N. C. 350, denying rehearing in 111 N. C. 120; s. c. 15 S. E. Rep. 941.

veyed.<sup>1</sup> Neither can an owner of land on both sides of a stream, subject to a mortgage upon the land upon one side of the stream, which includes the right to half the water, by raising the dam and diverting the whole of the water to uses upon the other side, and thus prevent a purchaser upon a sale under the foreclosure of the mortgage from acquiring a right to half the water.<sup>2</sup> From what has been said above it follows as a corollary that the purchaser at a foreclosure sale of the undivided interest of a tenant in common in lands takes an undivided interest in every part of the premises, and does not become sole owner of any definite subdivision thereof.<sup>3</sup> In short, the purchaser at a mortgage foreclosure sale becomes the absolute owner of the premises in fee simple, where the mortgagor had such an estate in the property. A great many questions relative to the rights and interests of such purchaser have been discussed and decided by the courts in recent years. For convenience of collation they have been divided into groups, and those groups here follow arranged in as nearly alphabetical order as is practicable.

§ 577a. Same—Assessments—Condemnation and damage funds.—Where there has been a payment, under a decree by a referee in foreclosure, of a local assessment which is an apparent lien upon the mortgaged premises, out of the proceeds of the mortgage sale, is equivalent to a payment by the owner of the equity of redemption, and will entitle such owner, on the subsequent vacating of the assessment, to recover from the municipality the amount so paid.<sup>4</sup> It has been said that the foreclosure of mortgages upon land does not pass the title to a fund arising from a prior condemnation of a water right appurtenant to the land, or change the manner of distribution.<sup>5</sup> But it seems

<sup>1</sup> Trope v. Kerns, 83 Cal. 553; s. c. 20 Pac. Rep. 82; 23 Pac. Rep. 691.

<sup>2</sup> Dyer v. Cranston Print Works Co. 17 R. I. 774; s. c. 24 Atl. Rep. 827.

<sup>3</sup> Myers v. Pierce, 86 Ga. 86; s. c. 12 S. E. Rep. 973.

<sup>4</sup> Brehm v. Mayor, etc., New York, 104 N. Y. 186; s. c. 10 N. E. Rep. 158; 6 Cent. Rep. 195.

<sup>5</sup> Re Rochester, 136 N. Y. 83; s. c. 32 N. E. Rep. 702; 19 L. R. A. 161; 49 N. Y. S. R. 86.

Attorney's lien upon an award

that a mortgagee who purchases the mortgaged premises at foreclosure sale for the full amount of the mortgage debt is entitled, after the expiration of the time for redemption, without redemption having been made, to the damages awarded for a street improvement, the assessment for which was made after the foreclosure sale, although the proceedings were instituted before the foreclosure.<sup>1</sup>

§ 577b. Same—Assignee of mortgagee—Purchaser.—It is thought that a purchaser in good faith and for value from a mortgagee who, upon an attempted foreclosure and sale bid in the property, becomes the assignee of the mortgage, where the decree was a nullity, and his possession is that of a mortgagee in possession after condition broken, which he is entitled to retain as against heirs of the mortgagor or their grantee.<sup>2</sup> But it would seem that the assignees of a purchaser at a mortgage sale void as being made under a judgment obtained by the mortgagee against himself as administrator of the mortgagor, though not chargeable by the identity of name with notice that the mortgagee and administrator were the same person, and of the consequent invalidity of the judgment, acquire no title as against the heirs of the mortgagor, in the absence of any act or failure on the part of the latter creating an estoppel.<sup>3</sup>

§ 577c. Same—Bona fide purchaser.—It has been said that the title of a *bona fide* purchaser for value without notice on a mortgage sale is not affected by the fact that the holder of the mortgage had prevented a tender by refusing to accept payment, except on conditions which he had no right to make.<sup>4</sup> And the possession of a *bona fide* grantee of a purchaser at a void foreclosure sale having con-

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in condemnation proceedings is superior to the rights of the grantee of the purchaser at a sale under a subsequent foreclosure of a mortgage on the property. *Gates v. De La Mare*, 49 N. Y. S. R. 775; s. c. 20 N. Y. Supp. 837.

<sup>1</sup> *Moritz v. St. Paul*, 52 Minn. 409; s. c. 54 N. W. Rep. 370.

<sup>2</sup> *Bryan v. Pinney* (Ariz. 1892), 31 Pac. Rep. 548.

<sup>3</sup> *Id.*

<sup>4</sup> *Holland v. Citizens' Sav. Bank*, 16 R. I. 734; s. c. 19 Atl. Rep. 654; 8 L. R. A. 553.

tinued after the expiration of the time of redemption, his title becomes absolute; and his subsequent failure to keep up his improvements, or to cultivate or occupy the premises, will not affect his right to the land or the possession.<sup>1</sup>

It is held by the supreme judicial court of Massachusetts, in *Hermans v. Fanning*,<sup>2</sup> that in a case where the insurance on mortgaged premises is paid to the mortgagee on receipts from him and also from the owner of the equity of redemption, who is induced to sign a receipt by an assignment of the mortgage to his brother, he himself paying the balance due on the mortgage, and his brother subsequently assigns the mortgage to one who enters and sells the land under a power of sale in the mortgage,—a *bona fide* purchaser at the sale acquires a good title as against a purchaser from the owner of the equity of redemption.

§ 577d. Same—Community property.—The doctrine of community property, we have already seen,<sup>3</sup> prevails in many of the states, carved out of the territory acquired by the "Louisiana Purchase," in which the civil law, instead of the common law, forms the basis of the judicial system. It is said that a sale of community property upon foreclosure of a special mortgage held by a community creditor, evidenced by an authentic act importing a confession of judgment and containing the non-alienation clause, will convey a valid title to a purchaser, although foreclosed in executory proceedings against the surviving husband alone.<sup>4</sup> And in Washington, upon a sale, under a decree of the court, of mortgaged community property under the statute,<sup>5</sup> the community title is sold; and the execution of a deed purporting to convey only the right of the deceased member of the community therein will not deprive the purchaser of his right to the entire premises.<sup>6</sup>

<sup>1</sup> *Jellison v. Holloran*, 44 Minn. 199; s. c. 46 N. W. Rep. 332.

<sup>2</sup> 151 Mass. 1; s. c. 23 N. E. Rep. 493.

<sup>3</sup> See: *Ante*. § 536b.

<sup>4</sup> *Landreaux v. Lougue*, 43 La. Ann. 234; s. c. 9 So. Rep. 32.

<sup>5</sup> Wash. Code, 1881, § 1524.

<sup>6</sup> *Ryan v. Ferguson*, 3 Wash. 356; s. c. 28 Pac. Rep. 910.



§ 577e. Same—Error and fraud.—The general rule is that a purchaser in good faith and for value of land at a foreclosure sale, cannot be divested of title although gross error and fraud of others interested in the procurement of the decree and sale.<sup>1</sup> In an Illinois case it was insisted that there was collusion and fraud between Henderson, the then guardian of the plaintiffs in error, and one Gilfillin, in procuring the decree of foreclosure. The court say:

“It is a fundamental doctrine that fraud will not be presumed, but must be proved. True, fraud can rarely be established by direct evidence, and must, ordinarily be proved by facts and circumstances shown which raise the inference that fraud was perpetrated. \* \* \* The bare fact that the record discloses that, by agreement of the guardian and Gilfillin, the decree was to be rendered for \$500, to be paid in installments of \$300 and \$200, is, in view of the facts shown, insufficient to raise the inference that it was fraudulently done. If entitled to the decree foreclosing the deed as a mortgage, to which the court found he was entitled, no reason is apparent why Gilfillin should not have obtained a decree for the full amount of his allowance by the county court of Cumberland county. That he consented to take a decree for less rather rebuts than raises an inference that he sought to overreach, or obtain an unconscionable advantage, in that proceeding. It is sufficient to say, upon the whole record, it does not appear that fraud, such as ought, under the rules of chancery practice, to impeach or set aside the decree, is shown. More especially must this be held in view of the fact that the defendant in error, Yanaway, so far as appears by this record, was a *bona fide* purchaser at the sale subsequently made under such decree. There is, we think, a total failure to connect him with any fraud or collusion in the procurement of the decree, or in making the sale thereunder. Yanaway being, as we hold, a purchaser of said eighty-acre tract of land, in good faith and for value, cannot be disturbed, or divested

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<sup>1</sup> Swift v. Yanaway, 153 Ill. 197; s. c. 38 N. E. Rep. 580.



of his title, even though gross error and fraud by others, intervened in the procurement of the decree and sale."<sup>1</sup>

§ 577f. **Same—Emblements and ice.**—A purchaser at a foreclosure sale acquiring the title in fee simple, or all the title, is entitled to have and receive all the rights and privileges going with such title. This includes, of course, a right to the emblements;<sup>2</sup> but where crops and emblements have been severed before the completion of the sale and the delivery of the deed, they cease to be a part of the realty and do not pass therewith.<sup>3</sup>

Ice upon ponds and streams is in the nature of an emblement.<sup>4</sup> So long as it remains in its original state and attached to the land at the banks of the stream or pond, it is real property<sup>5</sup> and passes by a conveyance of the land; but when the ice has been seared and harvested, it becomes personal property, and does not pass with the land. Thus it has been said that a mortgagee who becomes the purchaser on foreclosure is not entitled to ice cut by a lessee of the mortgagor before foreclosure, although the house in which it was stored, the land on which the house was situated and the pond from which the ice was cut, were all sold under the mortgage.<sup>6</sup> Hence a mortgagee and purchaser on foreclosure sale of ice houses and of the right to cut ice from a pond does not acquire title to ice cut and stored in the ice houses by the lessee of the mortgagor prior to the foreclosure sale.<sup>7</sup>

§ 577g. **Same—General creditors of mortgagor.**—The general rule is that assets derived from the sale of mortgaged premises on the foreclosure of the mortgage become, as regards creditors, the substitute for the property sold,

<sup>1</sup> The court cite: *Sibert v. Throop*, 77 Ill. 43; *Wadhams v. Gay*, 73 Ill. 415.

<sup>2</sup> See: *Post*, § 587; also 1 Kerr on Real Prop. § 50.

<sup>3</sup> See: 1 Kerr on Real Prop. §§ 71-73.

<sup>4</sup> The "great ponds" of Massachusetts and other states is an exception to the rule. The ice upon these

belongs by custom and statute to the first comer each season. See: 1 Kerr on Real Prop. § 74.

<sup>5</sup> See: 1 Kerr on Real Prop. § 68.

<sup>6</sup> *Gregory v. Rosenkrans*, 72 Wis. 220; s. c. 39 N. W. Rep. 378.

<sup>7</sup> *Gregory v. Rosenkrans*, 78 Wis. 451; s. c. 47 N. W. Rep. 832.

and the claims of creditors are transferred by the sale to the funds derived from such sales, and the purchaser takes the land freed from the claims of general creditors.<sup>1</sup> Such sale will prevent a subsequent levy of attachment against the debtor from having any effect, although the deed is not given until subsequent to the attachment.<sup>2</sup> Consequently the purchaser at a mortgage sale is not bound by an action against the mortgagor involving the title to the premise or by notice of its pendency, where he is not seasonably brought in as a party, and the mortgagees are not made parties until after the foreclosure.<sup>3</sup>

Sale on the foreclosure of a mortgage which is a prior and paramount lien will pass the title to the land free from a subsequent judgment lien, unless the land was redeemed from the foreclosure sale.<sup>4</sup> And it has been said that a purchaser claiming title under the assignee of a mortgage executed prior to a judgment against the mortgagor, and who were *bona fide* purchasers for value without notice other than the judgment and execution thereon, hold by a title superior to that of a purchaser at a sale upon execution under the subsequent judgment.<sup>5</sup>

§ 577h. **Same—Invalid mortgage.**—A mortgage which is invalid for any reason, carries with it no interest or rights, and a purchaser on foreclosure will acquire no title to the land sold. Thus it has been said that on the foreclosure of a mortgage given by a married woman and her husband upon property devised to her, to her sole and separate use free from the interference or control of her husband, and to her heirs and assigns forever, with no further provision in regard to alienation by her, the purchaser gets no title thereunder, since the mortgage is void, and a judgment

<sup>1</sup> *Vilas v. Page*, 106 N. Y. 439; s. c. 13 N. E. Rep. 743; 9 Cent. Rep. 471. See: *Chicago, R. I. & P. R. Co. v. Howard*, 74 U. S. (7 Wall.) 392; bk. 19 L; ed. 117.

<sup>2</sup> *Robinson v. Thornton*, 102 Cal. 605; s. c. 34 Pac. Rep. 120.

<sup>3</sup> *Hokanson v. Gudenson*, 54 Minn. 499; s. c. 56 N. W. Rep. 172.

<sup>4</sup> *Austin v. Bowman*, 81 Iowa 277; s. c. 46 N. W. Rep. 1111.

<sup>5</sup> *Martinez v. Lindsay*, 91 Ala. 334; s. c. 8 So. Rep. 787.

thereon is also void.<sup>1</sup> And where a widow gives a mortgage of the fee upon a lot in which she held a life estate only under her husband's will, although for thirty years she held it under the mistaken impression that she owned the fee, a sale conveys no title to the purchaser at a foreclosure sale made shortly after her death.<sup>2</sup>

But in those states in which the civil law doctrine of community property prevails,<sup>3</sup> where a widow gives a deed of trust upon lands purchased by the husband during their marriage with his separate means, to secure moneys advanced to her, containing nothing to show that they were not community property, and without notice that the lands were the separate estate of the husband, upon sale under the trust deed the purchaser acquires a superior title to half the land as against the heirs of the husband.<sup>4</sup>

§ 577i. Same—Irregularities and defects.—Irregularities and defects in the execution of the mortgage or trust deed, in the obtaining of a decree and order of sale, and in selling the property thereunder, may or may not prevent the purchaser at such sale from taking title. All depends upon the character and seriousness of the irregularities and defects. It is thought that a purchaser at a foreclosure sale takes title notwithstanding defects in proceedings upon which the judgment was obtained, so long as the judgment is not in itself void.<sup>5</sup>

It has been said that although a sale of mortgaged premises under a power of sale contained therein, in the absence of the mortgagee, is irregular, the legal title passes to the purchaser by the deed given to him.<sup>6</sup> And in those cases where the mortgage is invalid because of the failure of the mortgagee, a foreign corporation, to comply with the State laws in respect to having a place of business in the State,

<sup>1</sup> Hays v. Leonard (Pa. C. P.), 10 Pa. Co. Ct. 648.

<sup>2</sup> Mixer v. Woodcock, 154 Mass. 535; s. c. 28 N. E. Rep. 907.

<sup>3</sup> See: *Ante*, §§ 536b, 577d.

<sup>4</sup> Kirby v. Moody, 84 Tex. 201; s. c. 19 S. W. Rep. 453.

<sup>5</sup> Bailey v. Fanning Orphan School (Ky. 1890), 12 Ky. L. Rep. 644; s. c. 14 S. W. Rep. 908.

<sup>6</sup> Lanier v. McIntosh, 117 Mo. 508; s. c. 23 S. W. Rep. 787.

with an authorized agent, this will not invalidate the title under a sale made under the power contained in the mortgage, for the reason that the contract evinced by the mortgage is fully executed.<sup>1</sup>

The supreme court of Minnesota, in the case of *Russell v. H. C. Akeley Lumber Company*,<sup>2</sup> say that a purchaser at a defective foreclosure sale, or his assigns, who goes into possession of the premises with the assent of the mortgagor, or his successors, will be deemed a mortgagee in possession, and if he remains in possession until the right of redemption is barred, he becomes vested with the title.

§ 577j. **Same—Junior liens.**—In those cases where the proceedings are regular, and junior lienors are duly made parties to the action, the purchaser takes the realty freed from the lien of the junior incumbrancers,<sup>3</sup> subject to the right to redeem,<sup>4</sup> and in some states even that privilege is denied.<sup>5</sup> And after a valid sale under a senior mortgage a junior mortgagee cannot, by a suit to foreclose on the same property, compel one who claims to hold the title passed by such sale to appear and make proof thereof.<sup>6</sup>

<sup>1</sup> *Gamble v. Caldwell*, 98 Ala. 577; s. c. 12 So. Rep. 424.

<sup>2</sup> 45 Minn. 376; s. c. 48 N. W. Rep. 3.

<sup>3</sup> *Duesterberg v. Swartzel*, 115 Ind. 180; s. c. 17 N. E. Rep. 155; 14 West. Rep. 521. *Huzzey v. Heffernan*, 143 Mass. 232; s. c. 9 N. E. Rep. 570; 3 N. Eng. Rep. 325. See: *Hitchler v. Citizens' Bank*, 63 Miss. 403; *Stewart v. Wheeling & L. E. R. Co.*, 52 Ohio St. 151; s. c. 41 N. E. Rep. 247; 34 Ohio L. J. 56; 2 Ohio Leg. News 659; 29 L. R. A. 438.

A purchaser on foreclosure takes the property discharged from all liens and interests acquired pending the suit by persons charged with constructive notice thereof, although they were not made parties to the suit; and the latter must seek satisfaction from the proceeds of the sale. This

was the case of the sale of a railway. *Stewart v. Wheeling & L. E. R. Co.*, 52 Ohio St. 151; s. c. 34 Ohio L. J. 56; 2 Ohio Leg. News 659; 41 N. E. Rep. 247; 29 L. R. A. 438.

<sup>4</sup> *Duesterberg v. Swartzel*, 115 Ind. 180; s. c. 17 N. E. Rep. 155; 14 West. Rep. 521.

<sup>5</sup> The supreme judicial court of Massachusetts, in the case of *Huzzey v. Heffernan*, 143 Mass. 232; s. c. 9 N. E. Rep. 570; 3 N. Eng. Rep. 325, say that a sale under foreclosure of a prior mortgage terminates the interest of the junior mortgagee in the premises, and vests in the purchaser an estate in fee free from the junior mortgage, or from any right of redemption in the mortgagor or his subsequent grantees.

<sup>6</sup> *Hitchler v. Citizens' Bank*, 63 Miss. 403.

But in all jurisdiction where a senior mortgagee forecloses his mortgage and sells the property without making the junior mortgagee a party, or giving him notice, the purchaser at such judicial sale, whether it be the senior mortgagee or a stranger, acquires his title subject to the right of redemption by the junior mortgagee.<sup>1</sup> And the same rule obtains where the junior mortgagee has assigned all his interest in the mortgage and the notes secured thereby to a third person, who is not a party, and is without notice of such proceedings and sale;<sup>2</sup> and such owner of the notes and junior mortgage may maintain an action against such purchaser to foreclose his mortgage,<sup>3</sup> because the record of the junior unsatisfied mortgage to secure notes unpaid at the time of such sale put the purchaser upon inquiry.<sup>4</sup>

§ 577k. Same—Licenses and trusts.—It is held that the purchaser at a mortgage sale of lands subject to a secret resulting trust takes the land freed from the trust, where the mortgagee had no notice of the trust at the time of taking the mortgage, although such purchaser had notice at the sale, and was a surety on the bond secured by the mortgage, and was familiar with the whole transaction.<sup>5</sup> And a person who takes possession of premises under a mere license from the mortgagee cannot set up his possession against the claim of a purchaser at a regular foreclosure sale under the mortgage to immediate possession, sustained by the referee's deed, although such licensee has had no notice of the foreclosure proceedings.<sup>6</sup>

The supreme judicial court of Massachusetts, in the case

<sup>1</sup> Holliger v. Bates, 43 Ohio St. 437; s. c. 2 N. E. Rep. 841; 1 West. Rep. 516.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

mortgage, or estop him from foreclosing it. Holliger v. Bates, 43 Ohio St. 437; s. c. 2 N. E. Rep. 841; 1 West. Rep. 516.

<sup>4</sup> *Id.*

<sup>5</sup> Logan v. Eva, 144 Pa. St. 312; s. c. 22 Atl. Rep. 757; 28 W. N. C. 464, 48 Phila. Leg. Int. 454.

<sup>6</sup> Wing v. De la Rionda, 131 N. Y. 422; s. c. 30 N. E. Rep. 243; 43 N. Y. S. R. 305.

The fact that the purchaser of the notes and mortgage did not take a written assignment of the junior mortgage and record it, or obtain from the mortgagor a quit claim deed of his equity of redemption and record it, does not defeat his junior



of *Cook v. Young*,<sup>1</sup> say that an arrangement between persons interested in real estate subject to a mortgage, that at foreclosure one should take title, and, after making sale, divide the surplus, implies that such one should have power, in his discretion, to make a sale, convey good title to the purchaser, and collect the purchase money, and does not create a resulting trust following the land. And it is also said the fact that the first mortgagee is, by the terms of the mortgage, to receive all profits and gains from the mortgaged property, and after paying what is due to himself, to pay over any surplus to other creditors, does not make him a trustee for them, where no surplus ever comes into his hands, so as to affect his purchase of the property on a foreclosure for his debt.<sup>2</sup>

§ 577l. Same—"More or less."—In the conveyance and mortgaging of real estate it is the usual practice to describe the property by metes and bounds, or governmental subdivisions, and fractions thereof, specifying the number of acres, and adding the qualification, "more or less."<sup>3</sup> But it is said that the omission of the words "more or less" after the number of acres as given in a mortgage, from the execution founded on a judgment of foreclosure, and from the entry of a levy, will not vitiate the sale as a sale of the entire tract embraced in the mortgage, or limit the quantity sold to the exact number of acres stated.<sup>4</sup> And the supreme court of South Carolina, in *ex parte Boyce*,<sup>5</sup> say that the purchaser of property at a mortgage foreclosure is entitled to a tract of three and one quarter acres on which the residence is situated, as well as to a tract of sixty-five and one-half acres, where it is described in the mortgage, and also in the complaint in the foreclosure proceedings as "being a place whereon" the mortgagor resides and containing sixty-five and one-half acres, more

<sup>1</sup> 11 N. E. Rep. 752; s. c. 4 N. Eng. Rep. 444.

<sup>2</sup> *New Orleans Nat. Banking Asso. v. Le Breton*, 120 U. S. 765; bk. 30 L. ed. 821; s. c. 7 Sup. Ct. Rep. 772.

<sup>3</sup> See: 3 Kerr on Real Prop. §§ 2335, 2336.

<sup>4</sup> *Breach v. O'Neal*, 94 Ga. 474; s. c. 20 S. E. Rep. 133.

<sup>5</sup> 19 S. E. Rep. 495.



or less, and the mortgagor for many years has treated the two parcels as one tract.

§ 577m. **Same—Mortgaged succession.**—The supreme court of Louisiana, in the case of Forstall's Succession,<sup>1</sup> say that where mortgaged succession property is sold by executory process, the purchaser cannot be compelled to pay to the succession representative the amount of ranking special mortgages which he is entitled to retain after satisfying the junior mortgage of the seizing creditor, but it is otherwise if the unsatisfied mortgages are general.<sup>2</sup>

§ 577n. **Same—Obligations of purchasers.**—In those cases where the grantee of a mortgagor takes subject to two mortgages, and purchases the property at a foreclosure sale under the first mortgage, this will not extinguish the lien of the second mortgagee, because, having taken his conveyance from the mortgagor subject to the lien of the second mortgage, he is bound thereby.<sup>3</sup> And a bondholder purchasing at a mortgage foreclosure sale and paying bonds for the mortgaged property may be compelled, by personal judgment, to pay the amount due upon other bonds subsequently decreed to be of equal standing with the bonds of such purchaser.<sup>4</sup>

The supreme court of the United States, in *Olcott v. Headrick*,<sup>5</sup> say that a purchaser of property at a foreclosure sale under a decree which makes him liable for claims against the receiver which shall be presented within six months after the confirmation of the sale, is liable for such a claim presented after said six months, where the decree of confirmation of the sale makes such purchaser liable for all claims against the receiver without any limitation as to the time of their presentation. And the same court say in the earlier case of *Lovell v. Cragin*,<sup>6</sup> that the obligation of

<sup>1</sup> 39 La. An. 1052; s. c. 3 So. Rep. 277.

<sup>2</sup> *Id.*

<sup>3</sup> See: *Kennedy v. Borie*, 166 Pa. St. 360; s. c. 31 Atl. Rep. 98; 36 W. N. C. 73.

<sup>4</sup> *Moran v. Hagerman*, 12 C. C. A. 239; s. c. 64 Fed. Rep. 499.

<sup>5</sup> 141 U. S. 543; bk. 35 L. ed. 851; s. c. 12 Sup. Ct. Rep. 81.

<sup>6</sup> 136 U. S. 130; bk. 34 L. ed. 372; s. c. 10 Sup. Ct. Rep. 1024.

purchasers on foreclosure to pay their *pro rata* share of the debt to holders of notes who are not parties, follows the land in the hands of third persons not parties to the judgment, and is in the nature of a judicial mortgage; but to be effective in Louisiana, as to such third persons, the judgment must be inscribed with the recorder of mortgages, and does not give a lien until it has been registered as required by the statutes.

§ 577o. Same—Parol trusts.—It is thought that where mortgaged lands are held under a parol trust, of which the mortgagee has no knowledge, and forecloses his mortgage without joining the beneficiaries, this will not avoid the sale, even though the purchaser had knowledge of the terms.<sup>1</sup>

§ 577p. Same—Possession and ejectment.—We have already seen that the purchaser at a foreclosure sale,—be he the mortgagee, lien holder, or a stranger,—acquires all the rights and estate of the mortgagor.<sup>2</sup> Among other things, he is entitled to recover in ejectment as against the mortgagor,<sup>3</sup> and also against persons, not made parties, for the purpose of determining the rights of the latter.<sup>4</sup> It is thought that a notice to quit, or demand for possession, need not be given by a purchaser at foreclosure sale in those cases where the occupant denies the tenancy and asserts ownership in himself.<sup>5</sup>

§ 577q. Same—Prior liens—Rights and liabilities.—It is axiomatic, though formally adjudicated and deter-

<sup>1</sup> Cooper v. Loughlin, 75 Tex. 524; s. c. 13 S. W. Rep. 37.

<sup>2</sup> See: *Ante*. § 577.

<sup>3</sup> Gill v. Weston, 110 Pa. St. 305; s. c. 1 Atl. Rep. 917; 1 Cent. Rep. 368, 370.

The supreme court of Pennsylvania, in the case of Gill v. Weston, *supra*, say it is unnecessary that such purchaser, in an action of ejectment brought by him against the defendant in the execution on which the land was

sold, or any one coming into possession under him, to show previous title to the land in the defendant in the execution. It is sufficient for him to show the judgment and execution with proceedings thereon. See: Young v. Algeo, 3 Watts (Pa.), 223, 227.

<sup>4</sup> Dodge v. Omaha & S. W. R. Co., 20 Neb. 226; s. c. 29 N. W. Rep. 936.

<sup>5</sup> Sims v. Cooper, 106 Ind. 87; s. c. 5 N. E. Rep. 726; 3 West. Rep. 728.

mined, that a mortgage foreclosure does not cut off the rights of persons and parties under a prior mortgage, where those rights are reserved by the decree.<sup>1</sup> It is equally true that a purchaser at a sale under a prior mortgage to the foreclosure of which the subsequent mortgagees were not made parties, cannot maintain an action to compel them to pay the amount of the prior mortgage and of the improvements placed by him on the premises.<sup>2</sup> And when a purchaser takes land expressly subject to two mortgages cannot, by defaulting in the payment of interest upon the prior mortgage, bring about a sheriff's sale and buy in the land so as to hold it discharged from the lien of the second mortgage; especially is this true where he enters into a combination for such result, and conceals the pendency of the foreclosure of the prior mortgage.<sup>3</sup> On the same principle, it is held that a purchaser at a foreclosure sale does not acquire a title paramount to a mortgage upon a portion of the premises as to which the lien of the mortgage foreclosed has been released, by taking in his own name a tax title under delinquent taxes paid with moneys paid to him by the referee out of the proceeds of the sale, under a provision of the decree that the back taxes be first paid, nor by the payment of taxes subsequently assessed against the property, since the back taxes are in effect paid by the court out of the moneys of those who should have paid them in the first instance, and the subsequent taxes are properly payable by such purchaser.<sup>4</sup>

The title of the purchaser at a foreclosure sale relates back to the time of the execution of the mortgage.<sup>5</sup> Hence,

<sup>1</sup> *Humphreys v. McKissock*, 140 U. S. 304; bk. 35 L. ed. 473; s. c. 11 Sup. Ct. Rep. 779; 46 Am. & Eng. R. Cas. 261; 10 Ry. & Corp. L. J. 303.

**A purchaser of a railroad sold under a decree of foreclosure, discharged of all liens and claims against the former owner or its receivers, cannot be compelled to pay a judgment against the receivers in favor of an injured employe.** Chi-

*cago & O. R. R. Co. v. McCammon*, 61 Fed. Rep. 772.

<sup>2</sup> *Robbins v. Beers*, 49 N. Y. S. R. 360; s. c. 21 N. Y. Supp. 221.

<sup>3</sup> *Kennedy v. Borie*, 166 Pa. St. 360; s. c. 31 Atl. Rep. 98; 36 W. N. C. 73.

<sup>4</sup> *Morss v. Burns*, 17 N. Y. Supp. 739; s. c. 44 N. Y. S. R. 479.

<sup>5</sup> See: *Post*, § 582.

it has been held that the purchaser at foreclosure sale of a building one wall of which the mortgagor, after the execution of the mortgage, had agreed in writing that the adjoining owner could use as a party-wall and place his joists therein, acquires such party wall and the ends of the joists placed therein, where the adjoining owner is duly made a party to the foreclosure action and barred of all right to the mortgaged property.<sup>1</sup> The Delaware chancery court, in the case of *Foxwell v. Slaughter*,<sup>2</sup> say that the purchaser of lands at a judicial sale on *scire facias* upon a mortgage cannot restrain the proceeding to judgment, by an assignee of a purchase money mortgage upon the same land, duly recorded and open to his inspection and executed at the same time as the mortgage on which the sale was had, although recorded later, on the grounds that it was agreed between the parties to both mortgages at the time of their execution, but not expressed therein, that the lien of the purchase-money mortgage was to be postponed to that of the other mortgage, and that the declarations of third parties and the general understanding were to the effect that the sale at which he purchased would pass a free title.

It is a general rule that a mortgagor cannot claim any benefit from a purchase of outstanding titles or claims to the property by the purchaser at the sale under the mortgage.<sup>3</sup> And the supreme court of Iowa, in the case of *Austin v. Bowman*,<sup>4</sup> say that it is not evidence of bad faith on the part of one holding a certificate to lands sold on foreclosure of a superior lien, that afterwards, observing defects in the title, he took security to protect himself against other incumbrances; nor will equity require him to abandon his valid title to the land and seek to recover on his security.

§ 577r. Same—Purchaser at irregular or invalid sale.—Invalid sales of mortgaged property convey no title

<sup>1</sup> *Leavenworth Lodge*, No. 2, I. O. O. F., v. *Byers*, 54 Kan. 323; s. c. 38 Pac. Rep. 261.

<sup>2</sup> 5 Del. Ch. 396.

<sup>3</sup> *Ritchie v. Judd*, 137 Ill. 453; s. c. 27 N. E. Rep. 682.

<sup>4</sup> 81 Iowa 277; s. c. 46 N. W. Rep. 1111.

as against parties having an interest or an equity in the mortgaged premises; an irregularity in such sale may be such as to prevent the title from passing thereunder. Thus it has been said that a purchaser of property at a sale under a deed of trust, with knowledge of an order enjoining the sale, acquires only such right, as against the plaintiff in the action wherein the injunction issued, as the equity of the trust creditor may, on hearing the cause, be held to confer.<sup>1</sup> And the mortgagee purchasing at an irregular foreclosure sale and conveying the land to a bona fide purchaser, may be compelled to account to the holder of an unrecorded deed who was not made a party.<sup>2</sup>

The supreme court of Minnesota, in the case of *Jellison v. Halloran*,<sup>3</sup> say that a grantee of a purchaser at a void foreclosure sale, who goes into and holds possession in good faith and under circumstances from which assent of the mortgagor may be implied, is the equitable assignee of the mortgage, and occupies the position of a mortgagee in possession.<sup>4</sup> And a purchaser of land at a sale under a trust deed made without the owner's knowledge and without any purpose to pay off the debt secured, but merely to give title to the purchaser in order that he may hold it as security for a debt from the owner's husband, can hold it, if at all, as a lien for no more than the amount bid in his name at the trustee's sale.<sup>5</sup>

§ 577s. **Same—Rents—Title to.**—The rents, issues and profits of mortgaged property pass to the purchaser thereof at a foreclosure sale. But a purchaser on foreclosure sale is not entitled to recover from the mortgagor for rent thereafter collected by him, where he did not assume to act as

<sup>1</sup> *Osborn v. Glasscock*, 39 W. Va. 749; s. c. 20 S. E. Rep. 702.

<sup>2</sup> *Slattery v. Schwannecke*, 44 Hun (N. Y.) 75.

<sup>3</sup> 44 Minn. 199; s. c. 46 N. W. Rep. 332.

<sup>4</sup> It is thought that the heirs of a mortgagor of two lots, each of which is liable for the entire debt, should not

be permitted to recover one of the lots from a purchaser at a void sale under the mortgage, without fully reimbursing the purchaser for money used in discharging the debt. *Whitney v. Krapf*, 8 Tex. Civ. App. 304; s. c. 27 S. W. Rep. 843.

<sup>5</sup> *Rogers v. Rogers* (Ill. 1892), 30 N.E. Rep. 542, aff'g 40 Ill. App. 430.



the purchaser's agent in the transaction. The remedy of the purchaser in such case is against the tenant.<sup>1</sup> Hence in those cases where a lessee who anticipates the payment of rent, with notice of an existing mortgage upon the premises, does so at his own peril, and can be compelled to pay a second time by the purchaser at a foreclosure sale under the mortgage, for the period elapsing after the foreclosure.<sup>2</sup>

§ 577t. **Same—Riparian mortgages.**—The supreme court of New York, in the case of *The Mutual Life Insurance Company v. Voorhis*,<sup>3</sup> say that a mortgagee of upland does not, upon foreclosure of his mortgage, obtain a title to lands under water in front of the upland, granted to the mortgagor by the state after the execution of the mortgage, and not included in the description in the mortgage. This holding seems to be somewhat in conflict with the New

<sup>1</sup> *Hatch v. Sykes*, 64 Miss. 307; s.c. 1 So. Rep. 248.

<sup>2</sup> *Hartley v. Meyer*, 2 Misc. 56; s.c. 20 N. Y. Supp. 855; 49 N. Y. S. R. 351.

The Indiana supreme court, in the case of *Bryson v. McCrary*, 102 Ind. 1; s. c. 1 N. E. Rep. 55; 3 West Rep. 337, say that under the Act of 1879, the tenant of the judgment debtor in possession was treated as the tenant of the purchaser, and was accountable to him for the reasonable rents, in the first instance, whether the judgment debtor was solvent or insolvent. If the premises were not redeemed, the rents so collected belonged to the purchaser. If the premises were redeemed, the rents so collected were allowed as a payment in favor of the judgment debtor on the judgment. Under Act 1861, if a person in good faith bought the rents from the judgment debtor, he could hold them as against the execution purchaser, and was not liable to him therefor. Under Act 1879, if a person bought the rents from the judgment debtor, he paid for them at his

peril, because the occupant of the premises was liable to the execution purchaser for the reasonable rents. But these changes did not so materially affect the rights of the mortgagor under a contract made before Act 1879 took effect as to bring that Act within the constitutional limitation as to existing contracts. The case of *Gale v. Parks*, 58 Ind. 117, so far as it holds that the execution purchaser might recover rents of the judgment debtor independently of the statute, must be regarded as overruled. *Bryson v. McCrary*, 102 Ind. 1; s. c. 1 N. E. Rep. 55; 3 West. Rep. 337.

**In railroad mortgages and foreclosures** a receiver of a road does not, by his receipt of rent from a lessee of the right to use a portion of the road under a contract made pending the suit, and by his recognition of the contract, create a general tenancy so as to affect the rights of the purchasers on foreclosure. *Farmers' Loan & T. Co. v. Chicago & A. R. Co.*, 44 Fed. Rep. 653.

<sup>3</sup> 71 Hun (N. Y.) 117; s. c. 24 N. Y. Supp. 529; 53 N. Y. S. R. 874.



Jersey doctrine as heretofore given,<sup>1</sup> and for that reason the facts in the case are here set out fully and the reasoning of the court given *in extenso*. The facts in the case are as follows: Peter Voorhis owned a lot of land in Nyack, Rockland county, bounded on the east by the Hudson river. On the 25th of April, 1872, he executed a mortgage, in which his wife joined, to the plaintiff, to secure a loan of \$40,000. This mortgage was foreclosed, and on the 23rd of July, 1873, was sold under a decree in the foreclosure action. The plaintiff bought in the property for \$10,000, and duly entered a judgment for the deficiency, which was \$32,853.40, on the 9th of December, 1880. On the 30th day of November, 1872, Peter Voorhis applied to the commissioners of the land office for a grant of land under water adjacent to this mortgaged property, and also in front of two other pieces he owned, adjoining the same. The grant was made upon the petition of Voorhis that he was the owner of the upland, and in occupation of the same, and that the grant was needed for the beneficial enjoyment of the adjoining uplands for shipping stone quarried on the uplands, and that the petitioner intended to build a dock for public steamboat uses and general purposes. Upon due publication of the notice of application the people of the state of New York granted the lands under water "for the purpose of promoting the commerce of our said state, or for the beneficial enjoyment of the adjacent owner," on the 23rd of July, 1873. Peter Voorhis died in the next year. The defendants were the heirs at law of the deceased. The court in the course of the opinion say: "The question is, what interest the facts gave the plaintiff in the lands under water in front of the mortgaged upland, A grant to any other person than the upland owner is void.<sup>2</sup> The applicant, Voorhis, was the owner of the land up to the sale under foreclosure. Before that time the mortgage was simply a security. Plaintiff had no other interest in the

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<sup>1</sup> See: *Ante*, § 259p.

<sup>2</sup> New York Session Laws, 1850, c. 283.

land than to be paid out of it.<sup>1</sup> The description in the mortgage did not include the lands under water. When it was given, Voorhis, the mortgagor, had no interest in it. The lands belonged to the state.<sup>2</sup> The court of appeals, in *Gould v. Railroad Company*,<sup>3</sup> held that the owner of the upland had no other right than all others in the lands under water, and, while this principle is questioned in *Rumsey v. Railroad Company*,<sup>4</sup> no question is made as to the title being in the people as to lands between high water mark and under water.<sup>5</sup> The foreclosure sale did not, therefore, extend a title in lands not covered by it. The mortgaged lands were not extended by the mortgagee being on tide water, as the lands under water then belonged to the sovereign. The title Voorhis took was absolute and unconditional.<sup>6</sup> The patentee, being the owner of the upland thereof, got a good title, and, if any right was obtained by the foreclosure sale, it was a right to sue for damages for an injury to the right of the upland to go to the river. This right was destroyed by the upland owner himself, and the mortgagee got the land covered by the mortgage."

§ 577u. Same—Subrogation of purchaser.—The general rule is that a bona fide purchaser at a mortgagee's sale which proves defective is, after paying the purchase money, subrogated to the rights of the mortgagee.<sup>7</sup> The mortgage

<sup>1</sup> *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119; *Calkins v. Calkins*, 3 Barb. Ch. (N. Y.) 305; *Gardner v. Heartt*, 3 Den. (N. Y.) 232; *Astor v. Miller*, 2 Paige. Ch. (N. Y.) 608; *Morris v. Mowatt*, 2 Paige. Ch. (N. Y.) 586; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603.

<sup>2</sup> *People v. Canal Appraisers*, 33 N. Y. 461; *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102.

<sup>3</sup> 6 N. Y. 522.

<sup>4</sup> 133 N. Y. 79; s. c. 30 N. E. Rep. 654.

<sup>5</sup> Citing: *Blakslee Manufacturing Co. v. Blakslee Sons Iron Works*, 129

N. Y. 155; s. c. 29 N. E. Rep. 2; *Rumsey v. Railroad Co.*, 114 N. Y. 423; s. c. 21 N. E. Rep. 1066; *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71.

<sup>6</sup> *Abbott v. Curran*, 98 N. Y. 665.

<sup>7</sup> See: *Jordan v. Sayer*, 29 Fla. 100; s. c. 10 So. Rep. 823; *Brown v. Brown*, 73 Iowa 430; s. c. 35 N. W. Rep. 507; *Lanier vs. McIntosh*, 177 Mo. 508; s. c. 23 S. W. Rep. 787; *Townsend v. Thomson*, 139 N. Y. 152; s. c. 34 N. E. Rep. 891; 54 N. Y. R. S. 665; *Brewer v. Nash*, 16 R. I. 458; s. c. 17 Atl. Rep. 857; *Givins v. Carroll*, 40 S. C. 413; s. c. 18 S. E.

is in equity regarded as assigned to such purchaser, even if the mortgagee's deed to him does not contain language amounting to a legal assignment. And this is so, even in case of a minor whose guardian inserted in the mortgage invalid powers of sale.<sup>1</sup> And it is said that an entry of satisfaction on the record of a mortgage by the mortgagee after an invalid sale of the premises does not debar the pur-

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Rep. 1030; *McCamant v. Roberts*, 87 Tex. 241; s. c. 27 S. W. Rep. 86, revg.; s. c. 25 S. W. Rep. 731.

A purchaser of mortgaged premises who pays the purchase price at a foreclosure sale which is invalid because of failure to describe the land in the advertisement or the deed, is entitled in equity to the security of the mortgage for the amount due and paid on the debt. *Lanier v. McIntosh*, 177 Mo. 508; s. c. 23 S. W. Rep. 787.

There being irregularities a purchaser at a sale of lands subsequently declared void therefor, made under a power in a mortgage, as well as purchasers thereof at a subsequent partition sale among the purchasers' heirs, is subrogated to the rights of the mortgagee, and such purchase operates as a transfer of the mortgage to him. *Givins v. Carroll*, 40 S. C. 413; s. c. 18 S. E. Rep. 1030.

Owner of equity of redemption not being a party to a sale under a decree in a foreclosure suit no title is conveyed, but the purchaser becomes subrogated to the rights of the mortgagee in the premises, as well as in the mortgage debt. *Jordan v. Sayre*, 29 Fla. 100; s. c. 10 So. Rep. 823. See: *Ante*, § 117.

The court of appeals of New York, in the case of *Townsend v. Thomson*, 139 N. Y. 152; s. c. 34 N. E. Rep. 891; 54 N. Y. S. R. 665, say that a purchaser at a mortgage foreclosure

sale defective and void as against the owner of the equity of redemption because he was not made a party to the action becomes an assignee of the mortgage, and, if he lawfully enters into possession of the land, a mortgagee in possession.

Where three judgments in foreclosure were attempted to be satisfied by one sale, which was held erroneous because one of them was against a single individual and the others were jointly against him and another, and the sale was set aside, a purchaser who has paid the two joint judgments may be subrogated to the rights of the mortgage creditors under those judgments. *Brown v. Brown*, 73 Iowa 430; s. c. 35 N. W. Rep. 507.

In Texas a probate court has no jurisdiction, without the mortgagor being made a party to order a sale by an administrator of a duplicate land certificate which was mortgaged to the intestate for a loan of money and for his services in procuring and locating it upon the lands; and such sale will vest in the purchaser no title to the certificate or land nor any right to the mortgage, and will not subrogate him to any of the mortgagee's rights, or to the lien upon the land or the certificate. *McCamant v. Roberts*, 87 Tex. 241; s. c. 27 S. W. Rep. 86, rev'g 25 S. W. Rep. 731.

<sup>1</sup> *Brewer v. Nash*, 16 R. I. 458; s. c. 17 Atl. Rep. 857.

chaser, who has paid the purchase price, of his right to the security of the mortgage for the amount due and paid on the debt.<sup>1</sup>

It is thought that as between heirs of a mortgagor and persons claiming under a purchaser at a void sale under a power contained in the mortgage, such persons are entitled to be credited with the amount paid at such mortgage sale, with interest added thereto annually, from which is to be deducted the rent due from them, but to which is to be added the amount paid for improvements and taxes.<sup>2</sup>

§ 577v. **Same—Taxes on land—Liability of purchaser for.**—It has been said that the purchaser of real estate at a sale under a trust deed is liable for the taxes accruing during the year of the sale, but which have not been assessed at the time, especially where the auctioneer publicly announced at the sale that the purchaser would be required to pay all the taxes for that year.<sup>3</sup> The supreme court of North Carolina say that a purchaser at a foreclosure sale obtains the premises free and clear from the burden of taxes resting upon them at the time the mortgage was executed, where the mortgagee at the time of the execution had no notice of such taxes, although the purchaser had notice thereof before his purchase under the statute,<sup>4</sup> providing that arrears of taxes “shall not affect purchasers without notice.”<sup>5</sup> But the supreme court of South Carolina, in the case of *Wilson v. Cantrell*,<sup>6</sup> say that a purchaser under foreclosure of a mortgage, having a lien before the issuance of a tax execution, takes title subject to that of the purchaser under the tax execution by virtue of the South Carolina statute declaring all taxes, assessments and penalties a first lien in all cases whatever upon the property taxed.<sup>7</sup>

<sup>1</sup> *Lanier v. McIntosh*, 117 Mo. 508; s. c. 23 S. W. Rep. 787.

<sup>2</sup> *Givins v. Carroll*, 40 S. C. 413; s. c. 18 S. E. Rep. 1030.

<sup>3</sup> *Grosvenor v. Bethel*, 93 Tenn. 577; s. c. 26 S. W. Rep. 1096.

<sup>4</sup> N. C. Laws, 1891, c. 391.

<sup>5</sup> *Moore v. Sugg*, 114 N. C. 292; s. c. 19 S. E. Rep. 147.

<sup>6</sup> 40 S. C. 114; s. c. 18 S. E. Rep. 517.

<sup>7</sup> *Wilson v. Cantrell*, 40 S. C. 114; s. c. 18 S. E. Rep. 517.

The supreme court of Missouri, in the case of *Bensieck v. Cook*,<sup>1</sup> say that the payment of taxes and of part of the debt secured by a trust deed is not a defense or counterclaim in favor of the owner of the equity of redemption against the purchaser of the property at the trustee's sale.<sup>2</sup>

§ 577w. **Same—Timber—Right to.**—The purchaser at mortgage sale acquires the trees growing upon the property at the time of the sale; and the title relating back to the time of the execution of the mortgage,<sup>3</sup> it therefore follows that a purchaser at a foreclosure sale takes free from the right conveyed by the mortgagor, subsequent to the execution of the mortgage, to cut timber on the land, although the grantee of such right purchased the mortgage and assigned it, with a verbal agreement that the timber should be discharged from the lien of the mortgage, where such purchaser has no notice of such agreement.<sup>4</sup> And the purchaser of land at a sale under a power in a mortgage gets a good title to the timber thereon as against a purchaser of the timber from the mortgagor, although he has had notice of an unrecorded release by the mortgagee as to the timber right after the sale, but before taking the deed.<sup>5</sup>

§ 577x. **Same—Usury—Bona fide purchaser.**—It is a well settled rule that the title of an innocent purchaser of land at a judicial sale under a mortgage is not affected by the usurious character of the mortgage.<sup>6</sup> It follows therefore that a person who, after the foreclosure sale and be-

<sup>1</sup> 110 Mo. 173; s. c. 19 S. W. Rep. 642.

<sup>2</sup> *Bensieck v. Cook*, 110 Mo. 173; s. c. 19 S. W. Rep. 642.

In *re Byrnes* (N. Y. 1886), 4 Cent. Rep. 113, the purchaser of real estate on foreclosure of a mortgage, made application to be allowed on his purchase money the amount of taxes on the property for the years 1877-1885, remaining unpaid, which was opposed on the ground that said taxes were illegally assessed and therefore not valid liens, and on consider-

ation by the court was refused, with liberty to the purchaser to be relieved from his purchase.

<sup>3</sup> See: *Ante*, § 577q; *Post*, § 1582.

<sup>4</sup> *Beaufort County Lumber Co. v. Dail*, 111 N. C. 120; s. c. 15 S. E. Rep. 941, rehearing denied in 112 N. C. 350; s. c. 17 S. E. Rep. 537.

<sup>5</sup> *Barber v. Wadsworth*, 115 N. C. 29; s. c. 20 S. E. Rep. 178.

<sup>6</sup> *Sharpe v. Tatnall*, 5 Del. Ch. 302; *Holmes v. State Bank*, 55 Minn. 530; s. c. 55 N. W. Rep. 555.



fore the expiration of the time of redemption, purchases the interest or estate of the mortgagee who bid in the property, will be protected as a bona fide purchaser.<sup>1</sup>

§ 578. **Execution and delivery of deed.**—Where land is purchased at a sale made under a decree of foreclosure, the title passes only on certificate of sale,<sup>2</sup> although on passing of the deed it relates back to the time of the execution of the mortgage.<sup>3</sup> Hence where a purchaser of land at a sale under a decree in chancery, before confirmation of the sale, institutes a suit based upon his title acquired through such purchase, he can obtain no relief predicted on such title, even though he should, by a supplement bill, establish a confirmation by the court subsequent to the filing of his original bill.<sup>4</sup>

It is said that the holder of a certificate of purchase at a foreclosure sale loses all rights under the certificate by neglecting to apply for a master's deed within the limit provided by statute;<sup>5</sup> after the time of redemption expires, he is not entitled to have the premises resold under the decree of foreclosure.<sup>6</sup> And the purchaser will not be entitled to a deed after that time even where he has been in actual possession of the land for more than fifteen years, claiming ownership, and has paid all the taxes assessed thereon.<sup>7</sup>

The supreme court of Michigan, in the case of *McCammon v. Detroit, Lansing and Northern Railroad Company*,<sup>8</sup> say that the failure of the sheriff to acknowledge a deed upon foreclosure by advertisement for five days after its filing will not invalidate the sale, as depriving the owner of the right of redemption in such time by paying the register of deeds, as the filing of the deed is notice to such owner.

<sup>1</sup> *Holmes v. State Bank of Duluth*, 53 Minn. 530; s. c. 55 N. W. Rep. 555.

<sup>2</sup> *Smith v. Bure*, 35 Minn. 234.

<sup>3</sup> See: *Ante*, § 577q; *Post*, § 582.

<sup>4</sup> *Brooks v. Kelly*, 63 Miss. 616.

<sup>5</sup> As Ill. Rev. Stat. c. 77, § 30.

<sup>6</sup> *Peterson v. Emmerson*, 135 Ill. 55; s. c. 25 N. E. Rep. 842; *School Trustees v. Love*, 34 Ill. App. 418.

<sup>7</sup> *Peterson v. Emmerson*, 135 Ill. 55; s. c. 25 N. E. Rep. 842.

<sup>8</sup> 103 Mich. 104; s. c. 61 N. W. Rep. 273.



§ 580. Error in description in mortgage—Correcting in deed.—It is thought that property omitted by accident from a trust deed, when both parties supposed the deed covered it, may be reached and sold in a foreclosure suit.<sup>1</sup> But it is said that a mortgage which describes other lands of the mortgagor than those intended by the parties will not be reformed by substituting those originally intended, when the lands described therein have been sold on foreclosure and realized the full amount of the mortgage.<sup>2</sup> Yet in a case where a mistake was made in the description of certain premises mortgaged, which mistake was carried through all the proceedings to foreclose the mortgage, sale of the premises, confirmation of sale, and deed to the purchaser, but it appeared that the premises intended to be mortgaged had actually been appraised and sold under such mortgage, and the purchaser had taken possession of the same, the court held that no injury to the heirs of the mortgagor being shown, the grantee of the purchaser was entitled to a decree correcting the mistake and quieting his title in said premises, but at his own cost and expense.<sup>3</sup>

The supreme court of New York say that an error in a deed and mortgage in describing the starting point cannot be remedied by proceedings to correct the misdescription, taken in a foreclosure proceeding after the sale, without notice to the purchaser; and as such misdescription renders the title unmarketable, the purchaser at the foreclosure will be relieved from his purchase.<sup>4</sup>

§ 582. Title of purchaser relates back to time of executing mortgage.—The purchaser at a mortgage foreclosure sale takes the place of the mortgagee in strict fore-

<sup>1</sup> *Shepard v. Pepper*, 133 U. S. 626; bk. 33 L. ed. 706; s. c. 10 Sup. Ct. Rep. 438.

<sup>2</sup> *Ray v. Ferrell*, 127 Ind. 570; s. c. 27 N. E. Rep. 159.

<sup>3</sup> *Parker v. Starr*, 21 Neb. 680; s. c. 33 N. W. Rep. 424.

Statements by one who was at the time the owner and in possession of land, as to where he

understood the boundary of the line to be, are admissible as against the purchaser at the sale on foreclosure of a mortgage then on the land. *Flagg v. Mason*, 141 Mass. 64; s. c. 6 N. E. Rep. 702; 2 N. Eng. Rep. 162.

<sup>4</sup> *Fitzpatrick v. Sweeney*, 56 Hun (N. Y.) 159; s. c. 30 N. Y. S. R. 525; 9 N. Y. Supp. 219, aff'd in 121 N. Y. 707 mem.

closure at common law;<sup>1</sup> the whole title vests in him on his receipt of a deed to the premises from the officer making the sale; and the title of such purchaser relates back to the time of the execution of the mortgage foreclosed,<sup>2</sup> and he succeeds as well to the title and estate acquired by the mortgagee by the delivery of the mortgage deed as to the estate the mortgagor had at the time of the execution of the mortgage.<sup>3</sup> The reason for this is because a decree of foreclosure of a mortgage in fee of land is in effect a decree that the estate vested in the mortgagor at the date of the mortgage, as well as that which shall at any time come to him, be sold; and the deed to the purchaser operates to transfer to him the estate so directed to be sold.<sup>4</sup> And the fact that between the dates of the execution and of the foreclosure of a mortgage in fee of land, the title, subject to the mortgage lien, has passed from the mortgagor and then back to him, cannot affect the title of a purchaser at the foreclosure sale.<sup>5</sup>

§ 583. **Time for redemption—Effect on title of purchaser.**—In those states where a permit is allowed in which the mortgagor or the owner of redemption, or the holders of an equitable interest in the premises, may pay the debt and costs and redeem the premises, during the time allowed for such redemption the purchaser has no right to be invested with the title. Under the Massachusetts statute it seems that it is not essential that a limitation to the time for redemption be expressly fixed, though in some cases it

<sup>1</sup> *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162; s. c. 16 Atl. Rep. 701; 12 N. J. L. J. 87.

<sup>2</sup> *Barnard v. Wilson*, 74 Cal. 512; s. c. 16 Pac. Rep. 307; *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162; s. c. 16 Atl. Rep. 701; 12 N. J. L. J. 87; *Moulton v. Cornish*, 61 Hun (N. Y.) 438; s. c. 16 N. Y. Supp. 267; 41 N. Y. S. R. 41.

<sup>3</sup> *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162; s. c. 16 Atl. Rep. 701; 12 N. J. L. J. 87.

**The purchaser's title is adverse** to an estate created by the conveyance of the land by the mortgagor, subsequent to the execution of the mortgage; and the purchaser's failure to appear in the probate court and ask for distribution to himself on settlement of such estate cannot prejudice his title. *Barnard v. Wilson*, 74 Cal. 512; s. c. 16 Pac. Rep. 307.

<sup>4</sup> *Barnard v. Wilson*, 74 Cal. 512; s. c. 16 Pac. Rep. 307.

<sup>5</sup> *Id.*

has been held that this omission has left the mortgage without foundation for foreclosure.<sup>1</sup>

§ 584. All fixtures pass to purchaser under referee's deed.—The rule as to fixtures which pass to a purchaser of land at a mortgage foreclosure sale, have heretofore been alluded to and partially discussed;<sup>2</sup> and that discussion, together with the discussion found in the second edition of this work,<sup>3</sup> sufficiently cover the subject.

§ 585. Same—Exceptions to the rule.—The exceptions to the general rule are fully set forth in this section in the second edition of the work. It remains but to add the case of *Rowland v. West*,<sup>4</sup> wherein it is held that a purchaser at a sale upon foreclosure of a mortgage upon a mill to which chattels have been affixed since the execution of the mortgage, cannot recover such chattels from the mortgagee in a mortgage upon such chattels, executed and duly filed before the execution of the real estate mortgage, and before the chattels were converted into fixtures.

§ 586. All permanent improvements pass under referee's deed.—We have already seen<sup>5</sup> that all fixtures pass as a part of the realty on a mortgage foreclosure sale.<sup>6</sup> The rule which governs as to fixtures that pass to a purchaser on a mortgage sale are the same as those

<sup>1</sup> *Shepard v. Richardson*, 145 Mass. 32; s. c. 11 N. E. Rep. 738; 4 N. Eng. Rep. 305.

<sup>2</sup> See: *Ante*, §§ 257, 257a.

<sup>3</sup> §§ 585, 586.

<sup>4</sup> 62 Hun (N. Y.) 583; s. c. 17 N. Y. Supp. 330; 43 N. Y. S. R. 698.

<sup>5</sup> See. *Ante*, § 584.

<sup>6</sup> See: *Gresham v. Ware*, 79 Ala. 192; *Sands v. Pfeiffer*, 10 Cal. 258; *Baird v. Jackson*, 98 Ill. 78; *Wood v. Whelen*, 93 Ill. 157; *Matzon v. Griffin*, 78 Ill. 477; *Dooley v. Crist*, 25 Ill. 551; *Clore v. Lambert*, 78 Ky. 224; *Wight v. Gray*, 73 Me. 297; *Union Bank v. Emerson*, 15 Mass. 159; *Higginbottom v. Benson*, 24

Neb. 461; s. c. 39 N. W. Rep. 18; *Chadwick v. Island Beach Co.*, 43 N. J. Eq. (16 Stew.) 616; s. c. 12 Atl. Rep. 380; 10 Cent. Rep. 863; *Voorhees v. McGinnis*, 48 N. Y. 278; *Snedeker v. Warring*, 12 N. Y. 170; *Bishop v. Bishop*, 11 N. Y. 123; s. c. 62 Am. Dec. 68; *Rice v. Dewey*, 54 Ark. (N. Y.) 455; *Gardner v. Finley*, 19 Barb. (N. Y.) 317; *Miller v. Plumb*, 6 Cow. (N. Y.) 665; s. c. 16 Am. Dec. 456; *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 246; *Babcock v. Utter*, 32 How. (N. Y.) Pr. 439; s. c. 1 Abb. App. Dec. (N. Y.) 27; *Sullivan v. Toole*, 26 Hun (N. Y.) 203; *Main v. Schwarzwaelder*, 4 E. D. Smith

which govern in a conveyance of the fee to the premises.<sup>1</sup> Under this rule all improvements of a permanent character are regarded as part of the mortgaged estate, and will inure to the benefit of the holder of the mortgage, and will pass to the purchaser on a foreclosure sale.<sup>2</sup> Thus, a house erected on the premises by the mortgagor becomes a part of the realty and passes with it to the purchaser at the mortgage sale.<sup>3</sup> The mortgagor is not entitled to any abatement for expenses incurred for betterments<sup>4</sup> or improvements of any kind.<sup>5</sup>

(N. Y.) 273; *Dakota Loan & T. Co. v. Parmalee* (S. D. 1894), 58 N. W. Rep. 811; *Lackas v. Bahl*, 43 Wis. 53.

The grantor of a mortgagor, subject to the mortgage, cannot retain possession against a purchaser under foreclosure. *Chadwick v. Island Beach Co.*, 43 N. J. Eq. (16 Stew.) 616; s. c. 12 Atl. Rep. 380; 10 Cent. Rep. 863.

<sup>1</sup> See: *Snedeker v. Warring*, 12 N. Y. 170; *Bishop v. Bishop*, 11 N. Y. 123; s. c. 62 Am. Dec. 68; *Bank of Utica v. Finch*, 3 Barb. Ch. (N. Y.) 293, 299; *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 246; *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.) 273; *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 306; s. c. 38 Am. Dec. 368; *Union Bank v. Emerson*, 15 Mass. 159; *Longstaff v. Meagoe*, 2 Ad. & El. 167.

<sup>2</sup> See: *Baird v. Jackson*, 98 Ill. 78; *Wood v. Whelen*, 93 Ill. 157; *Matzon v. Griffin*, 78 Ill. 477; *Dooley v. Crist*, 25 Ill. 551; *Mann v. Mann*, 49 Ill. App. 472; *Townsend v. Payne*, 42 La. An. 909; s. c. 8 So. Rep. 626; *Partridge v. Hemenway*, 89 Mich. 454; s. c. 50 N. W. Rep. 1084; *Higinbottom v. Benson*, 24 Neb. 461; s. c. 39 N. W. Rep. 418; *Turner v. Mebane*, 110 N. C. 413; s. c. 14 S.

E. Rep. 974; *Dakota Loan & T. Co. v. Parmalee* (S. D. 1894), 58 N. W. Rep. 811.

Personalty affixed to freehold cannot be claimed by the purchaser where, by express agreement between the mortgagor and the owner of the chattel, its character as personalty was not to be changed, but was to continue and be subject to the right of removal by such owner on failure of performance of conditions of sale. *Brand v. McMahon*, 38 N. Y. S. R. 576; s. c. 15 N. Y. Supp. 39.

The supreme court of Louisiana, in *Townsend v. Payne*, 42 La. An. 909; s. c. 8 So. Rep. 626, say that movable property placed upon a plantation before the sale of an undivided half thereof, together with the movable property, to one who executes his purchase-money mortgage therefor, is liable to seizure by the holder of notes secured by the mortgage; but movable property placed upon it by the vendor and vendee after entering into a planting partnership is not so liable.

<sup>3</sup> *Matzon v. Griffin*, 78 Ill. 477; *Dooley v. Crist*, 25 Ill. 551.

<sup>4</sup> See: 2 Kerr on Real Prop., § 1316.

<sup>5</sup> *Mann v. Mann*, 49 Ill. App. 472; *Dakota Loan & T. Co. v. Parmalee* (S. D. 1894), 58 N. W. Rep. 811.

**Changing and remodeling a**

§ 587. All emblements pass under referee's deed.—The general rule is that all emblements, while unmaturing and unharvested, attach to and pass with the land;<sup>1</sup> hence a sale of mortgaged premises under foreclosure conveys the growing crops to the purchaser on receipt of the deed, as against the mortgagor.<sup>2</sup> And where a vendee of the mortgagor assumes the payment of a mortgage on the lands, he occupies the position of a mortgagor in possession, and the growing crops planted by him while in possession pass to the purchaser on foreclosure sale as accessories to the lands.<sup>3</sup> And where a tenant, who rented the land pending a foreclosure, sows a crop of wheat after judgment in foreclosure, and the wheat is not ready to harvest until after the foreclosure sale and the sheriff's deed passes, as against the tenant, the crop belongs to the purchaser at such sale.<sup>4</sup>

**mortgaged house**, by one upon whose premises it has been moved by a grantee of the mortgagor, newly plastering and completely finishing the same, and adding a new addition and new porches thereto, and placing the entire building on a stone foundation, at a cost of about \$600, does not destroy the identity of the mortgaged building so as to defeat the mortgagee's right to subject it to the payment of so much of his mortgage debt as remains unpaid after exhausting the mortgaged lot on which the building originally stood. *Dakota Loan & T. Co. v. Parmalee* (S. D. 1894), 58 N. W. Rep. 811.

**Improvements by bona fide purchaser at a foreclosure sale** of a senior mortgage, to which junior mortgagees were not made parties, is entitled to credit therefor in a suit against him by the junior mortgagees to require him to redeem, and should not be charged with the rental value of the premises during his possession. *Higinbottom v. Benson*, 24 Neb. 461; s. c. 39 N. W. Rep. 418.

**Same—Bona fide occupant under claim of title**, is entitled to compensation, at least as a set-off, against mesne profits; but knowledge or notice of adversary rights is fatal to the claim for compensation, and a mortgagee who repudiates the relation, or a purchaser from him with notice, is regarded as a wrong-doer, and is not entitled to compensation. *Gresham v. Ware*, 79 Alabama 192.

**The purchaser of a railroad under a mortgage** cannot claim to use a depot under a contract made by the mortgagor after the execution of the mortgage without payment of the rental provided for in the contract. *St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* (Mo. 1895), 31 S. W. Rep. 908.

<sup>1</sup> See: 1 Kerr on Real Prop. § 50.

<sup>2</sup> *Wallace v. Cherry*, 32 Mo. App. 436.

<sup>3</sup> *Hayden v. Burkemper*, 101 Mo. 644; s. c. 14 S. W. Rep. 767, aff'd 40 Mo. App. 346.

<sup>4</sup> *Goodwin v. Smith*, 49 Kan. 351; s. c. 31 Pac. Rep. 153; 17 L.R.A. 254.



But where a standing crop is fully matured at the time of the sale in foreclosure, it belongs to the tenant growing the same, as against the purchaser at the sale;<sup>1</sup> and one who buys a fully matured crop standing on the mortgaged premises and unharvested, from the mortgagor before the commencement of foreclosure proceedings but after default on the mortgage, obtains a good title to such crop as against the receiver appointed in such foreclosure proceedings, or the purchaser on sale in foreclosure.<sup>2</sup> It has been held, however, that one who purchases on execution sale nursery trees and bushes raised for sale on mortgaged premises, after foreclosure and sale perfected by the passing of the deed, cannot take them away without liability to the mortgagee, or the purchaser under the foreclosure sale, although he might have taken them away before the title under such sale was perfected.<sup>3</sup>

§ 588. **Right of purchaser to rents.**—The purchaser of land at a mortgage foreclosure sale does not acquire the title until the sale is confirmed<sup>4</sup> and the deed delivered.<sup>5</sup> Until the title passes, the mortgagor, or the owner of the equity of redemption, is entitled to the possession of the mortgaged property and to receive the rents and profits,<sup>6</sup>

<sup>1</sup> Richards v. Knight, 78 Iowa 69 ; s. c. 42 N. W. Rep. 584; 4 L. R. A. 453; Caldwell v. Alsop, 48 Kan. 571 ; s. c. 29 Pac. Rep. 1150; 17 L. R. A. 782.

<sup>2</sup> Caldwell v. Alsop, 48 Kan. 571 ; s. c. 29 Pac. Rep. 1150; 17 L. R. A. 782.

<sup>3</sup> Batterman v. Albright, 122 N. Y. 484 ; s. c. 25 N. E. Rep. 856 ; 11 L. R. A. 800.

<sup>4</sup> See : *Ante*, § 553 *et seq.*

<sup>5</sup> See : *Ante*, § 576 *et seq.*

<sup>6</sup> Rudolph v. Herman (S. D. 1893), 56 N. W. Rep. 901 ; Grosvenor v. Bethel, 93 Tenn. 577 ; s. c. 26 S. W. Rep. 1019.

In Delaware purchaser entitled to rents accruing after day of sale

on the foreclosure of mortgage, under a decree of the United States circuit court; the Delaware statute for the apportionment of rents in the case of sheriff's sales does not apply. Williams v. Cochran, 8 Houst. (Del.) 420; s. c. 31 Atl. Rep. 1050.

In South Dakota mortgagor of property sold under foreclosure is entitled to the rents and profits thereof during the year of redemption, under Dak. Comp. L., § 5431, providing that the possession of the premises sold under foreclosure shall not be delivered to the purchaser until after the expiration of one year from the sale. Rudolph v. Herman (S. D. 1893), 56 N. W. Rep. 901.

A purchaser who fails to record



unless steps have been taken by the mortgagee to have them applied in discharging the mortgage debt; and until such time as the deed is delivered the tenant will not be affected by the mortgage foreclosure proceedings.<sup>1</sup> But as soon as the title passes the purchaser is entitled to the rents and profits, and may recover the rent from a lessee of the mortgagor as the same falls due under the lease, notwithstanding payment thereof by the lessee to the mortgagor after notice of the rights of such purchaser;<sup>2</sup> and in those cases where the rents have been paid in advance to a receiver *pendente lite*, to a time beyond the delivery of the deed upon the sale under the mortgage, the purchaser is entitled to all rents from the time the deed was delivered.<sup>3</sup>

There are few general rules of law without exceptions, and there is an exception to the above rule, in those cases where a mortgagee of lands purchases them at

within thirty days after the expiration of the equity of redemption, and who leaves the debtor in possession of the property, cannot claim the crops thereon which are attached as the debtor's property. *Wolcott v. Hamilton*, 61 Vt. 79; s. c. 17 Atl. Rep. 39.

**The purchaser at a sale of real estate under a trust deed is not entitled to the rents accruing on the property between the date of his purchase and his acceptance of a deed and going into possession, where he paid only a portion of the purchase money down, without paying any interest on the balance, and his delay in obtaining possession was his own fault.** *Grosvenor v. Bethel*, 93 Tenn. 577; s. c. 26 S. W. Rep. 1019.

<sup>1</sup> See: *Richards v. Knight*, 78 Iowa 69; s. c. 42 N. W. Rep. 584; 4 L. R. A. 453; *Whalen v. White*, 25 N. Y. 462.

<sup>2</sup> *Dunton v. Sharpe*, 70 Miss. 850; s. c. 11 So. Rep. 168; *Cowen v. Arnold*, 58 Hun (N. Y.) 437; s. c. 12

N. Y. Supp. 601; 35 N. Y. S. R. 134; *Clement v. Shipley* (N. D.), 51 N. W. Rep. 414.

**Entitled to rents accruing under a lease for a term of years, as against one to whom the mortgagor assigned, after the execution of the mortgage, rent notes given before its execution for the rent of each year, since the rents pass under the mortgage as a hereditament.** *Dunton v. Sharpe*, 70 Miss. 850; s. c. 11 So. Rep. 168.

**A different rule prevails in Texas, where a mortgagor can by leasing the premises and assigning his claim for rent, sever the rent from the land, so that a sale of the latter will not convey a right to demand the rent subsequently falling due under the lease.** *Security Mortg. & T. Co. v. Gill*, 8 Tex. Civ. App. 358; s. c. 27 S. W. Rep. 835.

<sup>3</sup> *Cowen v. Arnold*, 58 Hun (N. Y.) 437; s. c. 35 N. Y. S. R. 134; 12 N. Y. Supp. 601.

his own foreclosure sale for the full amount of the debts and costs. In such a case he is not entitled to the rents and profits previously collected and in the hands of a receiver appointed in the foreclosure proceedings, nor to rents paid before he obtains title by deed.<sup>1</sup>

§ 588a. **Same—Accounting for rents and profits.**—The purchaser of lands on execution remaining in possession of land during the year following the sale of property under mortgage foreclosure is liable to account for the rent to the foreclosure purchaser.<sup>2</sup> But in those cases where a sale under a power in a mortgage is completed, and the mortgage extinguished, the acceptance by the purchaser of a formal assignment of the mortgage will not cut down his right to the rents and profits which had become absolute as against the mortgagor; and he will not be liable to an action by the mortgagor for the sum due on the purchase.<sup>3</sup> It is said by the supreme court of Washington<sup>4</sup> that under the statute of that state,<sup>5</sup> providing that the purchaser from the day of sale until a redemption, and the redemptioner from the day of redemption until another redemption, shall be entitled to the possession of the property, or to the rents or value of the use and occupation during the same period, if in possession of a tenant, a purchaser at a sale under foreclosure of a mortgage cannot be required to account at the suit of the mortgagor to redeem, for rents and profits arising from the use and occupation of the premises during the interval between the sale and redemption.

It is thought that it is not the duty of a purchaser from the mortgagee under a power of sale in the mortgage, to give notice to the mortgagors in respect to the liability of the mortgagee to account to them for the rents and profits from the time he took possession under an abortive sale

<sup>1</sup> *Pacific Mut. L. Ins. Co. v. Beck* (Cal. 1893), 35 Pac. Rep. 169.

<sup>2</sup> *Edwards v. Johnson*, 105 Ind. 594; s. c. 5 N. E. Rep. 716; 3 West. Rep. 683.

<sup>3</sup> *Walpole v. Quirk*, 143 Mass. 72; s. c. 9 N. E. Rep. 9; 3 N. Eng. Rep. 196.

<sup>4</sup> *Hardy v. Herriott*, 11 Wash. 460; s. c. 39 Pac. Rep. 958.

<sup>5</sup> 2 Hill's Wash. Code, § 519.

to himself until a valid exercise of the power, or to see to the application of the purchase money.<sup>1</sup>

§ 589. **Appeal and reversal—Effect on purchaser's title.**—The general rule is that in all cases where the court has jurisdiction of the parties and of the subject matter of the action, and power to render a judgment therein, the title of a bona fide purchaser at a sale made under a judgment and decree of foreclosure will not be affected by an appeal and reversal; but it will be otherwise where the party purchases on behalf of the judgment creditors.<sup>2</sup> Thus, the supreme court of California, in the case of *Withers v. Jacks*,<sup>3</sup> say that in a contest between foreclosing mortgages, as to priority, where the one defeated takes an appeal without asking for or receiving a stay of proceedings, while the other mortgage is being foreclosed; and the judgment is reversed because of defects in the findings, and it is adjudged that the appeal does not affect the mortgagor in any manner; the foreclosure of the mortgage which is given priority by the judgment is final, and a purchaser thereunder holds a good title as against any prior proceeding by the other mortgagee. And it has been stated that a purchaser of property from a party to whom a deed under a foreclosure sale has regularly issued, is not affected by the revocation of the order confirming the sale, under proceedings commenced after he had acquired his title, although the order of revocation was made at the same term of court as the order of confirmation.<sup>4</sup>

§ 590. **Delivering possession of premises to purchaser.**—It is well established that a court of equity has authority to decree the possession of land in all con-

<sup>1</sup> *Henderson v. Astwood*, P. C. (1894), A. C. 150.

<sup>2</sup> *Shelden v. Pruessner*, 52 Kan. 593; s. c. 35 Pac. Rep. 204.

A purchaser for judgment creditors is not entitled to the protection of Kansas Civil Code, § 467; providing that the reversal of a judgment

will not affect the title of a bona fide purchaser of land sold thereunder. *Shelden v. Pruessner*, 52. Kan. 503; s. c. 35 Pac. Rep. 204.

<sup>3</sup> 79 Cal. 297; s. c. 21 Pac. Rep. 824.

<sup>4</sup> *Hollister v. Mann*, 40 Neb. 572; s. c. 58 N. W. Rep. 1126.

troversies regarding the title thereto, where properly brought within its jurisdiction. Where the statute provides that the purchaser shall have possession of the property from the date of purchase until resale or redemption, unless it is in the possession of a tenant,<sup>1</sup> this right will be enforced by the court.<sup>2</sup>

§ 591. Possession obtained by summary process.—It is usually provided in every judgment of foreclosure and sale, that the purchaser be let into possession on production of the deed of the officer making the sale; but even in the absence of such a provision the purchaser will be entitled to the possession of the land on compliance with the terms of the sale. The supreme court of Florida, in the case of *McLane v. Piaggie*,<sup>3</sup> say that a purchaser at a foreclosure sale should, upon demanding possession of the property purchased, exhibit to the party in possession the master's deed; and a vendee of the purchaser should exhibit both such deed and that from the purchaser to him, if he intends to apply for a writ of assistance against such party.

§ 593. Writ of assistance — When granted. — The holder of the deed of a sheriff, or other proper officer of the court, for real estate purchased under a decree of foreclosure of a mortgage and a sale of the mortgaged premises, has a right to a writ of assistance to procure the possession of the premises purchased, as against all persons who were parties to the foreclosure suit, and all who hold under authority given by such parties after the commencement of such suit.<sup>4</sup> But a writ of assistance can only issue against parties to the suit, or persons coming into possession under the defendant after its commencement.<sup>5</sup> The supreme court of Illinois, in the case of *Cochran v. Folger*,<sup>6</sup> say that a decision by a justice, in forcible detainer, in favor of the

<sup>1</sup> As does Was. Code Civ. Proc. §519.

<sup>2</sup> *Debenture Corp. v. Warren*, 9 Wash. 312; s. c. 37 Pac. Rep. 451.

<sup>3</sup> 24 Fla. 71; s. c. 3 So. Rep. 823.

<sup>4</sup> *Watkins v. Jerman*, 36 Kan. 464; s. c. 13 Pac. Rep. 793.

<sup>5</sup> *Pidcock v. Melick* (N.J. Ch. 1886), 3 Cent. Rep. 676.

<sup>6</sup> 116 Ill. 194; s. c. 5 N. E. Rep. 383; 3 West. Rep. 59.

mortgagor, after decree of sale, but without demand for possession or production of the master's deed, is not a bar to writ of assistance to the purchaser on foreclosure.

§ 600. Summary proceeding to obtain possession.—The supreme judicial court of Massachusetts, in the case of *North Brookfield Savings Bank v. Flanders*,<sup>1</sup> say that a mortgagee in a mortgage containing a power of sale, and giving him authority to purchase at a sale thereunder, who procures another to become the purchaser as his agent, and simultaneously to execute a quitclaim deed of the lands to him, may maintain an action under the statute of that state,<sup>2</sup> to recover the possession, providing that on such sale under a power in the mortgage is entitled to the premises, may recover possession thereof by summary proceedings as therein provided. The court of civil appeals of Texas, in the case of *Meyer v. Orynski*,<sup>3</sup> say that a purchaser of lands at a sale under a trust deed is entitled to a writ of sequestration, and to the seizure thereunder of the lands, where they are withheld from him by an assignee for creditors of the mortgagor, whose assignment was executed after the execution of the trust deed.

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<sup>1</sup> 161 Mass. 335; s. c. 37 N. E. Rep. 307.

<sup>2</sup> Mass. Pub. Stat., c. 175, §1.

<sup>3</sup> 25 S. W. Rep. 655 (1894).



## CHAPTER XXIX.

### JUDGMENT FOR DEFICIENCY.

REPORTING DEFICIENCY—WHO LIABLE FOR—LIABILITY ON BOND—GUARANTY  
AND ASSUMPTION—INTENTION OF PARTIES GOVERN—HOW AMOUNT  
DETERMINED—EXECUTION FOR—MISCELLANEOUS MATTERS.

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| <p>§ 601. Generally.</p> <p>601a. When Judgment for deficiency not granted.</p> <p>602. Referee conducting sale reporting deficiency.</p> <p>603. Contingent decree for deficiency.</p> <p>603a. Suit at law for deficiency.</p> <p>604. Power of court of chancery to decree judgment for deficiency.</p> <p>605. Judgment for deficiency against mortgagor.</p> | <p>§ 605a. Same—Service of process by publication.</p> <p>605b. Same—Death of mortgagor.</p> <p>606. Judgment for deficiency against third persons.</p> <p>608. Deficiency against party assuming mortgage.</p> <p>617. No judgment for deficiency for installments not yet due.</p> <p>618. Deficiency—How determined.</p> <p>616. When judgments for deficiency may be docketed.</p> |
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§ 601. **Generally.**—In all those cases where there is an express agreement for the payment of money, and the mortgaged premises fail to sell for enough to pay the debt and costs and expenses of suit, the court will direct that the unsatisfied balance be levied on other property of the mortgage debtor.<sup>1</sup> But a judgment for deficiency entered where no indebtedness actually exists, cannot be used for purposes of redemption.<sup>2</sup>

It is said that under the Mississippi code,<sup>3</sup> providing that, upon the confirmation of the report of sale of property under a decree to satisfy a mortgage or other lien, the court shall render a decree for any balance, such decree

<sup>1</sup> Thomas v. Simmons, 103 Ind. 419; s. c. 2 N. E. Rep. 203; 3 Id. 381; 1 West Rep. 120; Ind. Code 1852, § 634; 2 Ind. Rev. Stat., 1876, p. 262; Rev. Stat. 1881, § 1097.  
(1303)

<sup>2</sup> Wetherbee v. Fitch, 117 Ill. 67; s. c. 7 N. E. Rep. 513; 4 West Rep. 220.

<sup>3</sup> Miss. Code, § 1035.

may be had against the personal representative of the deceased mortgagor.<sup>1</sup>

The proceedings to collect a deficiency left after applying the proceeds of the sale of mortgaged lands on foreclosure sale to the discharge of the mortgage debt, are purely statutory, and the statute in each particular instance governs. It has been said that a further or other judgment for deficiency is not necessary in a mortgage foreclosure, where the decree of foreclosure directs a sale and judgment for deficiency; nor is an order confirming the sale necessary as to those persons against whom the judgment for deficiency is directed.<sup>2</sup> But a foreclosure decree in the alternative that the defendants pay the debt within thirty days, or upon their failure the land shall be sold, does not create a personal liability.<sup>3</sup>

It is held error to include in a personal decree against a mortgagor on the notes secured by the mortgage in a foreclosure suit brought by the mortgagee's executor, an item of interest against which limitation had run before the mortgagee's death.<sup>4</sup> But the fact that a mortgagee in an action to foreclose his mortgage procured an amount to be found due in excess of the sum actually due, does not preclude the recovery of a deficiency judgment by him for the amount actually due, where in the proceedings for such deficiency judgment the amount found due in the decree is mutually disregarded and a new accounting had.<sup>5</sup>

A personal judgment for deficiency may be rendered not only for the amount of interest and principal remaining unpaid, but also for insurance moneys, under a provision of the mortgage that the premises shall be kept insured, and, in case of default made by the mortgagor, the same shall be performed by the mortgagee, and all expenses incurred in so doing shall be paid by the mortgagor.<sup>6</sup>

<sup>1</sup> Weir v. Field, 67 Miss. 292; s. c. 7 So. Rep. 355.

<sup>2</sup> Taylor v. Derrick, 46 N. Y. S. R. 583; s. c. 19 N. Y. Supp. 785.

<sup>3</sup> Dates v. Winstanley, 53 Ill. App. 623.

<sup>4</sup> McIntire v. Conrad, 93 Mich. 526; s. c. 53 N. W. Rep. 829.

<sup>5</sup> Grand Island Sav. & L. Asso. v. Moore, 40 Neb. 686; s. c. 59 N. W. Rep. 115.

<sup>6</sup> Building & L. Asso. v. Logan, 66 Fed. Rep. 827.

§ 601a. When judgment for deficiency not granted.—The judgment for deficiency and the proceedings to collect it being purely statutory, the judgment can be granted only in those cases where authorized. There can be no judgment for deficiency granted against the maker of a promissory note secured by a valid deed of trust before the security has been legally exhausted by foreclosure.<sup>1</sup> Neither can a judgment for deficiency be had upon a mortgage foreclosed for default in payment of interest, in those cases where the principal is not due, and there is no provision in the mortgage that it shall become due upon default in payment of installment of interest.<sup>2</sup>

In Connecticut the statute<sup>3</sup> bars further action on a mortgage debt where there has been a foreclosure without making the mortgagee a party thereto.<sup>4</sup> In New York it is held that no judgment for deficiency can be rendered under the code,<sup>5</sup> providing for judgment for deficiency in a mortgage debt after sale of the property and application of the proceeds, in an action to foreclose a mortgage, where a sale is rendered impossible by foreclosure and sale under a prior mortgage, although thereafter judgment for sale has been entered, and although a surplus is left upon such sale, after the application of which a balance remains due upon the debt.<sup>6</sup> And in South Carolina it is said, in the case of *Hartzog v. Goodwin*,<sup>7</sup> that a mortgagee who fails in a foreclosure because payments made are held to extinguish the mortgage debt, instead of another due him from the mortgagor to which he had sought to apply them, cannot in the foreclosure suit have personal judgment against the mortgagor for the balance due upon the latter debt.

## § 602. Referee conducting sale reporting deficiency.

<sup>1</sup> *Powell v. Pattison*, 100 Cal. 236; s. c. 14 Atl. Rep. 771; 6 N. Eng. s. c. 34 Pac. Rep. 677. Rep. 760.

<sup>2</sup> *Farmers' Loan & T. Co. v. Grape Creek Coal Co.*, 13 C. C. A. 87; s. c. 65 Fed. Rep. 717. See: *Post* § 617. <sup>5</sup> N. Y. Code Civ. Proc., § 1627. <sup>6</sup> *Frank v. Davis*, 61 Hun (N. Y.) 496; s. c. 41 N. Y. S. R. 292; 16 N. Y. Supp. 369.

<sup>3</sup> Conn. Act. 1878.

<sup>4</sup> *Curtis v. Hazen*, 56 Conn. 146; 880. <sup>7</sup> 37 S. C. 603; s. c. 15 S. E. Rep.

—The general rule is to require the referee conducting a sale in mortgage foreclosure to report any deficiency remaining unpaid after the sale of the property and application of the proceeds thereof to the payment of the mortgage debt, together with the names of the parties who are liable for the payment of such deficiency. On the confirmation of the report of the officer making the sale and such a report, a judgment for deficiency may be docketed, when the judgment and decree of sale so provides.<sup>1</sup> But it is said that such judgment cannot be entered, even contingently, until after the officer appointed to make the sale has made and filed his report,<sup>2</sup> and, even then, the clerk should not enter up such judgment without the further order of the court.<sup>3</sup> Thus, it is said by the supreme court of South Carolina, in the case of *Lawton v. Perry*,<sup>4</sup> that no judgment exists for any deficiency of the mortgage debt after the proceeds of a sale under foreclosure of the mortgaged property have been applied thereto, until an order of the court is had on the report of the officer making the sale showing what deficiency exists, for a judgment for such deficiency, with leave to enforce its collection by execution. Consequently, a judgment of foreclosure is erroneous and void in providing for the recovery of any specific sum of money as a deficiency to be enforced by execution, before the mortgaged premises are sold and the proceeds of the sale found to be insufficient.<sup>5</sup>

The rule requiring application to the court for an order confirming the report of the officer appointed to make the sale, and to enter further judgment upon the filing of said report, before issuing execution in supplementary proceedings, is not uniformly applied in the courts. In New York

<sup>1</sup> See: *Bache v. Doscher*, 9 Jones & S. (N. Y.) 150; *Bank of Rochester v. Emerson*, 10 Paige Ch. (N. Y.) 359; *Cartly v. Graham*, 8 Paige Ch. (N. Y.) 480.

<sup>2</sup> *Hunt v. Dohrs*, 39 Cal. 304; *Culver v. Rogers*, 28 Cal. 520; *Englund v. Lewis*, 25 Cal. 337; *Cormerias v. Genella*, 22 Cal. 116; *Rowland v.*

*Leiby*, 14 Cal. 156; *Lipperd v. Edwards*, 39 Ind. 165; *Cobb v. Thornton*, 8 How. (N. Y.) Pr. 66.

<sup>3</sup> *Leviston v. Swan*, 33 Cal. 480.

<sup>4</sup> 40 S. C. 255; s. c. 18 S. E. Rep. 561.

<sup>5</sup> *Parr v. Lindler*, 40 S. C. 193; s. c. 18 S. E. Rep. 636.

it is held not to be essential;<sup>1</sup> a failure to procure a confirmation before issuing such execution being a mere irregularity at most, and inasmuch as it is purely a question of procedure, the decision of the lower court is final.<sup>2</sup> In Michigan, a special application is required to be made to the court before an execution can issue on a judgment for deficiency;<sup>3</sup> and in Nebraska, a prior order of confirmation is essential,<sup>4</sup> as is also the case in New Jersey<sup>5</sup> and Wisconsin.<sup>6</sup>

§ 603. **Contingent decree for deficiency.**—In those cases where it is probable that the mortgaged premises, on foreclosure, will not sell for sufficient to pay the mortgage debt, the correct practice is to take a contention judgment in the decree of foreclosure and sale for the payment of any deficiency which may appear upon the coming in and confirmation of the report of the sale, and that the plaintiff may have execution for such deficiency. But a personal judgment against the maker of a promissory note secured by a valid deed of trust, is improper before the security has been legally exhausted by foreclosure.<sup>7</sup> The court of appeals of Missouri, in the case of *Steckman v. Harber*,<sup>8</sup> say that a person who has purchased notes covered by a deed of trust from one who agreed that he would not collect the money when it became due without first giving those liable thereon notice, and who directs the foreclosure of such deed at a place 100 miles distant without notifying those liable, although he sees them almost daily and knows that they are able to pay the amount of the notes, will not be

<sup>1</sup> *Bicknell v. Byrnes*, 23 How. (N. Y.) Pr. 486; *Springsteene v. Gillett*, 30 Hun (N. Y.) 260; *Moore v. Shaw*, 15 Hun (N. Y.) 428, affd. 77 N. Y. 512; *Bache v. Doscher*, 9 Jones & S. (N. Y.) 150, affd. 67 N. Y. 429; N. Y. Code Civ. Proc., § 1627.

<sup>2</sup> *Moore v. Shaw*, 77 N. Y. 512, affg. 15 Hun (N. Y.) 428; N. Y. Code Civ. Proc., § 721, subd. 12.

<sup>3</sup> *McCrickett v. Wilson*, 50 Mich. 513; s. c. 15 N. W. Rep. 885; *Gies*

*v. Green*, 42 Mich. 107; s. c. 2 N. W. Rep. 283.

<sup>4</sup> *Clapp v. Maxwell*, 13 Neb. 542; s. c. 14 N. W. Rep. 653.

<sup>5</sup> *White v. Zust*, 28 N. J. Eq. (1 Stew.) 107.

<sup>6</sup> *Tormey v. Gerhart*, 41 Wis. 54; Wis. Laws, 1862, p. 243.

<sup>7</sup> *Powell v. Pattison*, 100 Cal. 236; s. c. 34 Pac. Rep. 677.

<sup>8</sup> 55 Mo. App. 71.



allowed a judgment for the amount of the notes, interest and costs, without making a deed to those liable thereon of the lands purchased by him at the sale under the deed of trust. It is said by the supreme court of New York, in the case of *Brewer v. Longnecker*,<sup>1</sup> that a provision in a decree foreclosing a mortgage for an installment of the whole sum secured, and directing a sale of the whole premises, and that in case of a deficiency in the proceeds to pay the installment the defendants personally liable for the debt pay such deficiency, is improperly amended by providing for the payment of a deficiency in the whole mortgage debt not due, where there is another provision that in case the proceeds of the sale shall be insufficient to pay the whole debt the plaintiff, as installments become due, may apply for judgment against such defendants.

§ 603a. *Suit at law for deficiency.*—In those cases where there is an express agreement for the payment of money, and on the sale of the mortgaged premises the sum realized from the property is not sufficient to discharge the mortgage debt, the mortgagee or holder of the mortgage may maintain an action at law for the amount remaining after deducting the face of the debt, with interest and costs, from the amount for which the mortgaged property was sold;<sup>2</sup> because in such a case the foreclosure merely extinguishes the debt to the extent of the money produced by the sale of the mortgaged premises and applicable to the

<sup>1</sup> 15 N. Y. Supp 937; s. c. 40 N. Y. S. R. 614.

<sup>2</sup> *Porter v. Pillsbury*, 36 Me. 278; *Briggs v. Richmond*, 27 Mass. (10 Pick.) 391, 396; *West v. Chamberlain*, 25 Mass. (8 Pick.) 336; *Amory v. Fairbanks*, 3 Mass. 562; *Andrews v. Scotton*, 2 Bland Ch. (Md.) 269; *Lansing v. Goelet*, 9 Cow. (N. Y.) 346; *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380; s. c. 15 Am. Dec. 474; *Case v. Boughton*, 11 Wend. (N. Y.) 106, 109; *Morgan v. Plumb*,

9 Wend. (N. Y.) 287, 292; *Spencer v. Harford*, 4 Wend. (N. Y.) 384, 386; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 14; *Hatch v. White*, 2 Gall. C. C. 154; *Omaly v. Swan*, 3 Mass. C. C. 474; *Tooke v. Hartley*, 2 Bro. Ch. 125; s. c. *sub nom* *Tooke v. —*, 2 Dick. 785. *Aylet v. Hill*, 2 Dick. 551; *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317; *Perry v. Barker*, 13 Vesy. 198, 204; s. c. 9 Rev. Rep. 171.

obligation.<sup>1</sup> The supreme court of California say, in the case of *Blumberg v. Birch*,<sup>2</sup> that a new action upon a note originally secured by a mortgage, for a deficiency upon foreclosure upon which no valid judgment could be obtained because service was made by publication, is not barred by the code of that State,<sup>3</sup> providing that there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon either real or personal property. It is said by the supreme court of New York, in the case of *Schultz v. Mead*,<sup>4</sup> that leave to sue at law on a judgment for deficiency is not necessary, because the code<sup>5</sup> has reference to the original debt which the mortgage secures, and does not apply to a suit for the deficiency.

It is said, in the case of *Winters v. Hub Mining Company*,<sup>6</sup> that a mortgagee who obtains a mortgage of foreclosure cannot thereafter maintain a separate action for the deficiency remaining, against the person liable for the debt, under a statute providing that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions therein made for the sale of the property and judgment for the deficiency.<sup>7</sup>

§ 604. Power of court of chancery to decree judgment for deficiency.—In the absence of a statute conferring authority, a court of equity does not, upon the foreclosure of a mortgage, make a personal decree for any deficiency against the mortgagor.<sup>8</sup> It is said, in the case of *Taffey v. Atcheson*,<sup>9</sup> that a mortgage executed in New Jersey before the statute of 1880,<sup>10</sup> declaring that no decree

<sup>1</sup> *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380 ; s. c. 15 Am. Dec. 474. *Dunkley v. Van Buren*, 2 John. Ch. N. Y.) 231.

<sup>2</sup> 99 Cal. 416 ; s. c. 34 Pac. Rep. 102.

<sup>3</sup> Cal. Code Civ. Proc. § 726.

<sup>4</sup> 8 N. Y. Supp. 663 ; s. c. 29 N. Y. S. R. 203.

<sup>5</sup> N. Y. Code Civ. Proc. § 1628.

<sup>6</sup> 57 Fed. Rep. 287.

<sup>7</sup> Idaho Rev. Stat. 4520.

<sup>8</sup> *Rosenbaum v. Kershaw*, 40 Ill. App. 659.

<sup>9</sup> 42 N. J. Eq. (15 Stew.) 182 ; s. c. 6 Atl. Rep. 385 ; 4 Cent. Rep. 863.

<sup>10</sup> N. J. Pamphlet Laws, 1880, p. 255.

for deficiency shall be made in a foreclosure suit, is subject thereto, because the act does not affect the mortgage, but merely the remedy thereon. The supreme court of Utah, in the case of *Brerton v. Mills*,<sup>1</sup> say that the power inherent in the general equity jurisdiction given to the Utah supreme and district courts by the Organic Act<sup>2</sup> to direct a personal judgment for the debt and proceedings to collect it, before ordering a sale of mortgaged premises conveyed by the mortgagor with full covenants of warranty, cannot be abridged by a territorial statute providing that the lands must first be sold.

### § 605. Judgment for deficiency against mortgagor.—

On failure to comply with the terms of a mortgage, and foreclosure and sale because thereof, the mortgagor is entitled to credit only for the net proceeds realized from the sale. In most, if not all, the states there are statutes authorizing the court to award a conditional judgment for any deficiency there may be found and reported to the court by the officer authorized to make the sale.<sup>3</sup> Under these

<sup>1</sup> 7 Utah 426 ; s. c. 27 Pac. Rep. 81.

<sup>2</sup> U. S. Rev. Stat., § 1868.

<sup>3</sup> See: *Goodlett v. St. Elmo Invest. Co.*, 94 Cal. 297; s. c. 29 Pac. Rep. 105; *Windham County Sav. Bank v. Himes*, 55 Conn. 433; s. c. 12 Atl. Rep. 517; 5 N. Eng. Rep. 919; *Shelden v. Erskine*, 78 Mich. 627; s. c. 44 N. W. Rep. 146; *Weir v. Field*, 67 Miss. 292; s. c. 7 So. Rep. 355; *Flenthams v. Steward*, 45 Neb. 640; s. c. 63 N. W. Rep. 924; *Grand Island Sav. & L. Assoc. v. Moore*, 40 Neb. 686; s. c. 59 N. W. Rep. 115; *Frank v. Davis*, 135 N. Y. 275; s. c. 31 N. E. Rep. 1100; 48 N. Y. S. R. 86; 29 Abb. (N. Y.) N. C. 294; 22 Civ. Prac. Rep. 426; 20 Wash. L. R. 699; 17 L. R. A. 306; *Clark v. Simmons*, 55 Hun (N. Y.) 175; s. c. 8 N. Y. Supp. 74; 28 N. Y. S. R. 738; *Schultz*

*v. Mead*, 8 N. Y. Supp. 663; s. c. 29 N. Y. S. R. 203; *Shumway v. Orchard*, 12 Wash. 104; s. c. 40 Pac. Rep. 634; *Shepherd v. Pepper*, 133 U. S. 626; bk. 33 L. ed. 706; s. c. 10 Sup. Ct. Rep. 438.

**The Connecticut Act of 1833, Rev. 1875, p. 358, § 2**, providing that a mortgagee may recover the deficiency on foreclosure, is not repealed by Conn. Laws 1878, chap. 129, providing for an appraisal of the mortgaged property by appraisers, and that the mortgagee shall recover only the difference between the value of the property as fixed by the appraisal and the amount of his claim, except where the appraisal is made under a later statute. *Windham County Sav. Bank v. Himes*, 55 Conn. 433; s. c. 12 Atl. Rep. 517; N. Eng. Rep. 919.

The court holds these provisions are

statutes it has been held that a purchaser at a foreclosure sale under a first mortgage, being also owner of a second mortgage, may purchase at a subsequent sale thereunder subject to his rights acquired on the first sale, and enter judgment for the deficiency.<sup>1</sup> And it is said the fact that

not inconsistent, but alternative. Also that part of the latter Act providing that no suit for deficiency shall be brought against one not a party to the foreclosure suit repeals so much of the former Act as allowed suit against those not parties. *Windham County Sav. Bank v. Himes*, 55 Conn. 433; s. c. 12 Atl. Rep. 517; 5 N. Eng. Rep. 919.

In Michigan, *How. Mich. Stat. § 6702*, giving the court power to decree payment of any balance of a mortgage debt remaining unsatisfied after the sale, does not contemplate the case where there are several complainants who hold the mortgage jointly, but have no joint rights to any of the debts secured, and no provision is made for separate personal decree of deficiency in favor of the separate complainants. *Shelden v. Erskine*, 78 Mich. 627; s. c. 44 N. W. Rep. 146.

In Mississippi the exercise of the power conferred by Miss. Code, § 1935, upon the confirmation of the report of sale of property under a decree to satisfy a mortgage or other lien, to render a decree for any balance, is not to be limited to the term at which the sale is confirmed, but a decree for the balance may be moved for at any time before the statute of limitation bars its execution. *Weir v. Field*, 67 Miss. 292; s. c. 7 So. Rep. 355.

In Nebraska Code Civil Procedure, § 847, expressly authorizes the district court, on the coming in of the report of sale of mortgaged prem-

ises, to render a personal judgment and award execution for any deficiency remaining unpaid on the decree. *Flentham v. Steward*, 45 Neb. 640; s. c. 63 N. W. Rep. 924.

In Washington, under Code Procedure, § 628, providing that when there is an express agreement for the payment of money secured, contained in the mortgage or separate instrument, the decree of foreclosure shall direct that the balance due remaining unsatisfied after the sale shall be satisfied by any property of the mortgage debtor, a personal judgment may be rendered against the makers of a note secured by a mortgage upon real estate at the time of rendition of a decree of foreclosure, so as to make it a general lien upon all the property owned by the mortgagor at the time of the entry thereof or thereafter acquired, and a previous return of sale is not essential. *Shumway v. Orchard*, 12 Wash. 104; s. c. 40 Pac. Rep. 634.

Under U. S. Rev. Stat. § 808, relating to the District of Columbia, a decree *in personam* is authorized against a debtor for the balance remaining due after the proceeds of the sale of lands covered by a mortgage or a deed of trust in the nature thereof have been applied to the satisfaction of the debt. *Shepherd vs. Pepper*, 133 U. S. 626; bk. 33 L. ed. 706; s. c. 10 Sup. Ct. Rep. 438.

<sup>1</sup> *Clark v. Simmons*, 55 Hun (N.Y.) 175; s. c. 28 N. Y. S. R. 738; 8 N.Y. Supp. 74.

the mortgagee made a profit upon his purchase of the mortgaged premises is not a defense to an action on a judgment of deficiency.<sup>1</sup> It is thought that in a suit against an association of individuals sustaining to each other the relation of partners, to foreclose a mortgage made by it, the members at the time of the execution of the mortgage, and made parties to the suit, are each liable to a personal judgment for the deficiency.<sup>2</sup>

The New York court of appeals, in *Frank v. Davis*,<sup>3</sup> say that a judgment for a deficiency under a junior mortgage is not prevented by the impossibility of a sale of the land, which results from the fact that, pending appeal from the judgment of foreclosure, a sale of the land was made under a prior mortgage and a surplus was left insufficient to pay the junior mortgage, although the statute provides for a personal judgment for the residue of the debt, which is unsatisfied "after a sale of the mortgaged property." And it is held by the supreme court of Nebraska,<sup>4</sup> that a loan association holding stock of a mortgagor as additional security for the mortgage debt, is not obliged to resort to the security furnished by such stock before recovering a judgment for deficiency against the mortgagor. The supreme court of New York, in the case of *Hulbert v. Clark*,<sup>5</sup> say that an action for the foreclosure of a mortgage of real estate given to secure a simple-contract debt evidenced by promissory notes, being an action on the mortgage, and not on the notes, is solely an action *in rem* and no personal judgment for a deficiency can be had therein. And it is said that a mortgagee corporation cannot recover against the mortgagor in an action on the note, where it purchased the property for value from the mort-

<sup>1</sup> *Schultz v. Mead*, 8 N. Y. Supp. 663; s. c. 29 N. Y. S. R. 203.

<sup>2</sup> *Goodlett v. St. Elmo Invest. Co.*, 94 Cal. 297; s. c. 29 Pac. Rep. 505.

<sup>3</sup> 135 N. Y. 275; s. c. 31 N. E. Rep. 1100; 48 N. Y. S. R. 86; 29 Abb. (N. Y.) N. C. 294; 22 Civ. Proc.

Rep. 426; 20 Wash. L. Rep. 699; 17 L. R. A. 306.

<sup>4</sup> *Grand Island Sav. & L. Asso. v. Moore*, 40 Neb. 686; s. c. 59 N. W. Rep. 115.

<sup>5</sup> 57 Hun (N. Y.) 558; s. c. 19 Civ. Proc. Rep. 177; 11 N. Y. Supp. 417; 33 N. Y. S. R. 354.



gagor's grantee, causing the conveyance to be made to its president to prevent the merging of the mortgage in the legal title, and, on default of payment of the mortgage debt, foreclosed and bid in the property.<sup>1</sup> The supreme court of Pennsylvania, in the case of *Cock v. Bailey*,<sup>2</sup> say that the holders of bonds of a limited partnership, secured by a mortgage upon its realty, who purchased the mortgaged premises through a trustee designated by them, subject to the mortgage lien, cannot afterwards collect the amount of the bonds from the company or its members individually, since the bonds become a part of the purchase money withheld at the time of the sale. And it is thought a failure to carry out an agreement of a mortgage to bid the full amount of his judgment on foreclosure sale, in consideration of being permitted to take a default, constitutes an actionable fraud or wrong which entitles the mortgagors to relief against a personal judgment for a deficiency.<sup>3</sup>

§ 605a. **Same—Service of process by publication.**—In those cases where process in a mortgage foreclosure is served by publication only, no valid personal judgment can be entered for deficiency.<sup>4</sup> Yet it is said that a deficiency properly ascertained in a foreclosure suit commenced by publication of the summons, constitutes a subsisting indebtedness from the mortgagor so served, although no judgment can be entered therefor.<sup>5</sup>

§ 605b. **Same—Death of mortgagor.**—We have already seen<sup>6</sup> that the lien of a mortgage is not effected by the death of the mortgagor,<sup>7</sup> but the mortgagee or party holding the mortgage may proceed to foreclose the same. On such foreclosure the estate of the mortgagor is liable for any

<sup>1</sup> *National Invest. Co. v. Nordin*, 50 Minn. 336; s. c. 52 N. W. Rep. 899.

<sup>2</sup> 146 Pa. St. 328; s. c. 23 Atl. Rep. 370; 29 W. N. C. 233; 22 Pitts. L. J. N. S. 217; 1 Pa. Adv. R. 19.

<sup>3</sup> *Heim v. Butin*, 109 Cal. 500; s. c. 40 Pac. Rep. 39.

<sup>4</sup> *Blumberg v. Berch*, 99 Cal. 416; s. c. 34 Pac. Rep. 102.

<sup>5</sup> *Id.*

<sup>6</sup> See: *Ante*, § 256e.

<sup>7</sup> A power of sale in a mortgage is revoked by the death of the mortgagor in Georgia, and perhaps elsewhere. *Wilkins v. McGehee*, 86 Ga. 764; s. c. 13 S. E. Rep. 84.

deficiency.<sup>1</sup> This is equally true where the mortgage is foreclosed by the executor, under leave of court, for the payment of debts;<sup>2</sup> but no judgment for deficiency in a suit to foreclose the same can be rendered against the heirs or personal representatives,<sup>3</sup> for the heirs, administrators and widow of the deceased are not personally liable for the mortgage debt;<sup>4</sup> yet a judgment for the deficiency in an action to foreclose a mortgage made by a testator may, under the New York Code,<sup>5</sup> be rendered against a legatee who has received a sum from the estate, to the extent of the amount he has received.<sup>6</sup> It is said in New Jersey that a decree for deficiency entered on foreclosure cannot be enforced against heirs by execution first issued after defendant's death; a bill and subpœna being necessary.<sup>7</sup>

The supreme court of Michigan, in the case of *Culver v. Judges of Superior Court*,<sup>8</sup> say the rule that no proceeding at law can be taken to enforce payment of a deficiency on foreclosure, without leave of the court in which the foreclosure was had, applies only to remedies upon the personal securities given with the mortgage, and not to an action begun by leave of the equity court upon the bond of the mortgagor's residuary legatee. And the supreme court of New York, in the case of the *New York Life In-*

<sup>1</sup> See: *Pillow v. Santelle*, 49 Ark. 430; s. c. 5 S. W. Rep. 783; *Culver v. Judges Superior Court*, 57 Mich. 25; s. c. 23 N. W. Rep. 469; *Hill v. Townley*, 45 Minn. 167; s. c. 47 N. W. Rep. 653; *Demuth v. Kennedy* (N. J. Ch. 1890), 13 N. J. L. J. 150; *Collier v. Miller*, 62 Hun (N. Y.) 99; s. c. 16 N. Y. Supp. 633; 42 N. Y. S. R. 66; *New York Life Insurance Co. v. Aitkin*, 58 N. Y. Super. Ct. (26 Jones & S.) 586 mem.; 11 N. Y. Supp. 349; reversed in 125 N. Y. 660; 26 N. E. Rep. 732; 36 N. Y. S. R. 8; *Boardman v. Dennaforde*, 23 N. S. 529.

<sup>2</sup> *Boardman v. Dennaforde*, 23 N. S. 529. This decision was by a divided court. Y

<sup>3</sup> In *Minnesota* it is said the claim therefor must be presented, allowed, and enforced as other claims against the estate of the deceased mortgagor. *Hill v. Townley*, 45 Minn. 167; s. c. 47 N. W. Rep. 653.

<sup>4</sup> *Pillow v. Santelle*, 49 Ark. 430; s. c. 5 S. W. Rep. 783.

<sup>5</sup> N. Y. Code Civ. Proc. §§ 1837-1841.

<sup>6</sup> *Collier v. Miller*, 62 Hun (N. Y.) 99; s. c. 16 N. Y. Supp. 633; 42 N. Y. S. R. 66.

<sup>7</sup> *Demuth v. Kennedy* (N. J. Ch. 1890), 13 N. J. L. J. 150.

<sup>8</sup> 57 Mich. 25; s. c. 23 N. W. Rep. 469.

surance Company v. Aitkin,<sup>1</sup> say that an action against the executor of one who has assumed a mortgage on premises purchased cannot be maintained to recover a deficiency on foreclosure, where the executor was not made a party after the purchaser had died before the suit, and he had also been released by the immediate grantor.

§ 606. Judgment for deficiency against third persons.—In the absence of statutory provisions to that effect, the court has no authority to award a judgment for deficiency arising in a mortgage foreclosure proceedings against any person other than the mortgagor himself; consequently a grantor of lands, the title to which is taken in the name of only one of the grantees, who gives his note, secured by mortgage on the lands conveyed, for the unpaid purchase money, is restricted, in the absence of fraud, accident or mistake, to the security so taken, and cannot recover a deficiency judgment against the other purchasers who did not sign the note.<sup>2</sup>

On the same principle, a purchaser of part of mortgaged property, who has never assumed any personal liability for the mortgage debt, is not liable for a deficiency on a foreclosure thereof.<sup>3</sup> But where the grantee of the whole or a portion of the mortgaged premises has assumed and agreed to pay the mortgage debt as part of the purchase price thereof, a judgment for deficiency may be rendered against him equally with the mortgagor; and where such judgment is not awarded in the decree the defect may be remedied by amendment. Thus it has been held by the New Jersey court of chancery, in the case of *Forman v. Manley*,<sup>4</sup> that a judgment in foreclosure against a mortgagor grantor and a grantee who assumed the payment of the mortgage, the de-

<sup>1</sup> 58 N. Y. Super Ct. (26 Jones & S.) 586, mem. 11 N. Y. Supp. 349; reversed in 125 N. Y. 660; s. c. 26 N. E. Rep. 732; 36 N. Y. S. R. 8.

<sup>2</sup> *Reeves v. Wilcox*, 35 Neb. 779; s. c. 53 N.W. Rep. 973. Compare: *Reynolds v. Dietz*, 34 Neb. 265; s. c. 31 N. W. Rep. 747. See: *Post*, § 608.

<sup>3</sup> *Hall v. Young*, 29 S. C. 64; s. c. 6 S. E. Rep. 938.

<sup>4</sup> 52 N. J. Eq. (7 Dick.) 712; s. c. 29 Atl. Rep. 434. See: *Grand Island Sav. & L. Assoc. v. Moore*, 40 Neb. 686; s. c. 59 N. W. Rep. 115.

cree may be amended seventeen years after it was rendered, by inserting the clause of assumption; and the execution may be granted against the grantee on the motion of the mortgagor, where both defendants were served with process and notice of prayer for decree for deficiency, which was rendered, and it does not appear that the grantee had relied on the defect in the bill, or will be prejudiced by the proposed amendment.

The supreme court of South Carolina say, in the case of *Edwards v. Dargan*,<sup>1</sup> that a mortgagee in possession of property is not liable to any personal judgment in favor of a junior mortgagee in an action by the latter to foreclose the mortgage, although the latter may be entitled to foreclose because the property is insufficient to pay both; and the Illinois court of appeals, in the case of *McKenzie v. Hartford Life and Accident Insurance Company*,<sup>2</sup> say that a personal judgment should not be granted against the surviving husband and the heir-at-law of the mortgagor, in a suit to foreclose a mortgage to secure notes not signed by them, in the absence of proof that they have in any manner become liable for the payment of the notes.

It is thought that in a suit by a trustee substituted in the place of an executor, to foreclose a mortgage given to the latter by defendant, judgment cannot be rendered against the trust estate for the balance above the mortgage found to be due to the defendant for services rendered the executor for the estate, in the absence of any agreement creating a lien on the estate.<sup>3</sup>

The New Jersey court of errors and appeals say in *Dodd v. Fisher*,<sup>4</sup> that a person who deposits a sum of money to obtain a postponement of a foreclosure sale for a specified time, and to indemnify the mortgagee against any deficiency that may arise on the sale, is not discharged from liability by the advice of the mortgagee's counsel to the sheriff to

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<sup>1</sup> 30 S. C. 177; s. c. 8 S. E. Rep. ton, 47 N. Y. S. R. 422; 19 N. Y. 858. Supp. 986.

<sup>2</sup> 42 Ill. App. 157.

<sup>4</sup> 31 Atl. Rep. 392.

<sup>3</sup> *United States Trust Co. v. Stan-*

let a bid made at a sale stand without payment of a percentage thereof as required by the conditions of sale, and by the failure of such bidder to take the property, and its subsequent resale at a smaller price, where the advice was not given under such circumstances as to indicate a disregard of the indemnifier's rights.

§ 608. **Deficiency against party assuming mortgage:**—In those states where there are statutes authorizing the court, in proceedings for the foreclosure of mortgages, to give a judgment in the decree for any deficiency there may be after the application of the proceeds arising from a sale of the mortgaged property to the payment of the mortgage debt, the court may render a personal judgment for such deficiency against a party who has assumed the payment of the mortgage debt.<sup>1</sup> The supreme court of Kansas, in the case of the Northwestern Barb-Wire Company v. Randolph,<sup>2</sup> say that a personal judgment is properly rendered in a mortgage foreclosure against a grantee of land who assumed to pay certain mortgages, and conveyed the land by warranty deed to one who executed a subsequent mortgage to the holders of the former, for the amount of the mortgages assumed; and the proceeds of such judgment should be applied upon the mortgages assumed, to protect both the person to whom the covenant was made and the grantee with warranty.

The supreme court of Nebraska say, in the case of Reynolds v. Dietz,<sup>3</sup> that upon foreclosure of a mortgage upon land sold to several persons who each advance a portion of the consideration, taking title in the name of one in trust for the others and assuming the mortgage by making it part of the consideration, each of the persons advancing part of the consideration is liable for his proportion of the deficiency, according to the share owned by him, and no more.<sup>4</sup>

<sup>1</sup> Grand Island Sav. & Loan Assoc. v. Moore, 40 Neb. 686; s. c. 59 N. W. Rep. 115; Forman v. Manley, 52 N. J. Eq. (7 Dick.) 712; s. c. 29 Atl. Rep. 434.

<sup>2</sup> 47 Kan. 420; s. c. 23 Pac. Rep. 170.

<sup>3</sup> 34 Neb. 265; s. c. 51 N. W. Rep. 747.

<sup>4</sup> Compare: Reeves v. Wilcox, 35



§ 617. No judgment for deficiency for installment not yet due.—We have already seen<sup>1</sup> that a judgment for deficiency cannot be entered where no indebtedness actually exists.<sup>2</sup> And no judgment for deficiency can be granted upon a mortgage foreclosed for default in payment of interest, where the principle is not due and there is no provision that it shall become due upon default in interest.<sup>3</sup>

The supreme court of South Carolina, in the case of *Patterson v. Baxley*,<sup>4</sup> hold that a decree of foreclosure and sale rendered upon default in the payment of installments due, which, after ordering that upon the next installment becoming due the mortgagee have an order for the sale of the lands for such installment, further orders that the mortgagee be at liberty, at any time thereafter when any deficiency shall be due, to apply to the court for an execution against all the defendants to collect the amount due,—includes the judgment for the deficiency, which is entered as of the date of the entry of the decree, although the deficiency is subsequently ascertained and confirmed.

§ 618. Deficiency—How determined.—The mortgagor in a mortgage foreclosure being entitled to credit on the mortgage debt of only the amount of money realized from the sale after deducting the cost, taxes and expenses, the amount of deficiency for which he is liable on a personal judgment is to be ascertained by deducting the amount with which he is entitled to credit from the amount of the judgment. We have already seen<sup>5</sup> that the general practice is to require the referee, or other officer making the sale in a mortgage foreclosure, to ascertain and report the

Neb 779; s. c. 53 N. W. Rep. 978, in which the court held that where the title to lands is taken in the name of only one of the grantees who gives his individual note, secured by mortgage on the lands conveyed, for the unpaid purchase money, in the absence of fraud, accident or mistake, the grantor is restricted in his judgment for deficiency to the purchaser who signed the note.

<sup>1</sup> See: *Ante*, § 601.

<sup>2</sup> See: *Wetherbee v. Fitch*, 117 Ill. 67; s. c. 7 N. E. Rep. 513; 4 West. Rep. 22.

<sup>3</sup> *Farmers' Loan & T. Co. v. Grape Creek Coal Co.*, 13 C. C. A. 87; s. c. 65 Fed. Rep. 717.

<sup>4</sup> 33 S. C. 354; s. c. 11 S. E. Rep. 1065.

<sup>5</sup> See: *Ante*, § 602.

deficiency remaining unpaid, and on this report the court grants a personal judgment for the deficiency thus ascertained and reported.<sup>1</sup>

The supreme court of South Carolina, in the case of *Dial v. Gray*,<sup>2</sup> say that where joint debtors upon a note for a certain amount give a mortgage upon a lot owned by them jointly, to secure a certain proportion of such debt, and one of them gives a mortgage upon his individual property to secure the balance of the debt, in the absence of anything to show to the contrary, the respective parcels of land will be liable only for the portions of the debt secured upon them.

§ 619. When judgment for deficiency may be docketed.—In a mortgage foreclosure sale, a personal judgment cannot be rendered for any part of the mortgage debt until after the foreclosure sale of the mortgage.<sup>3</sup> But the supreme court of New York say that under a mortgage on lands partly in New York and partly in another state, the mortgagee is not bound to sell the land in the latter state before entering a judgment for deficiency.<sup>4</sup> And the same

<sup>1</sup> *Bache v. Doscher*, 9 Jones & S. N. Y. 150; *Bank of Rochester v. Emerson*, 10 Paige Ch. (N. Y.) 430.

<sup>2</sup> 27 S. C. 171; s. c. 3 S. E. Rep. 84.

<sup>3</sup> *Hall v. Young*, 29 S. C. 64; s. c. 6 S. E. Rep. 938.

<sup>4</sup> *Clark v. Simmons*, 55 Hun(N.Y.), 175; s. c. 8 N. Y. Supp. 74; 28 N. Y. S. R. 738. In this case the plaintiff held a mortgage on land partly in New York and partly in New Jersey. The judgment of foreclosure and sale directed the land in both States to be sold. Before the sale the defendant Simmons applied at special term to have the judgment modified so as to exclude the sale of the New Jersey land. This order was made. The premises had then been sold under the first mortgage, and had been purchased by one Conkey. Con-

key owned the second mortgage. The defendant Simmons also asked at the special term that the judgment be vacated, because the judgment had become merged in the fee so acquired by Conkey. This part of the ruling was denied. The judgment in this action provided that the plaintiff recover a judgment for the deficiency after the sale of the New York land. This part of the judgment was consented to when the judgment was entered, and no motion was made to change the decree in this respect. The condition on the second sale, that it should be subject to Conkey's rights acquired in the first sale, would manifestly convey a title subject to the payment of the amount due on the first mortgage. Conkey was the purchaser at the sale, and owned the second mortgage, and made the con-

court say, in the case of *Hawley v. Whalen*,<sup>1</sup> that a judgment for deficiency upon a foreclosure sale may properly be entered and docketed, notwithstanding a provision in the decree of foreclosure that a certain defendant pay any deficiency that may arise entitles plaintiff to issue execution therefor without further judgment.

The supreme court of California, in the case of *Toby v. Oregon Pacific Railroad Company*,<sup>2</sup> say that a deficiency judgment may be granted for the balance due, where a steamship, after a decree of foreclosure and sale thereof, has been sold by a receiver, under an interlocutory decree of the court, for less than the amount of the mortgage, and that sale has been confirmed, although California Code Civil Procedure, § 726, provides for a deficiency judgment only "if it appears from the sheriff's return that the proceeds are insufficient."

dition. No wrong was done and none intended. The entire bond was due on the second mortgage loan, and its reduction by a void sale did not injure those who were bound to pay the entire bond. The court say: "The plaintiff was not bound to sell the land in New Jersey before obtaining a judgment for the deficiency on the bond. Under the old practice, an action at law on the bond and a foreclosure in equity could go on together. *Dunkley v. Van Buren*, 3 John. Ch. (N. Y.) 330. The object of the Revised Statutes and of the Code, § 1627, was to have one

remedy by providing a judgment for a deficiency after sale. This means a sale that the courts of this state can order. The bond given to the plaintiff could be sued after the second sale without going through a foreclosure as to the land in New Jersey. The orders should therefore be affirmed, with costs and disbursements as of one appeal."

<sup>1</sup> 64 Hun (N. Y.) 550; s. c. 19 N. Y. Supp. 521; 46 N. Y. S. R. 512.

<sup>2</sup> 98 Cal. 490; s. c. 32 Pac. Rep. 550.

## CHAPTER XXX.

### RECEIVER—PRACTICE ON APPOINTMENT.

#### LIABILITY OF PARTIES SECURING APPOINTMENT FOR EMBEZZLEMENT BY.

§ 356a. Liability of parties securing appointment of for embezzlement by.

§ 356a. Liability of parties securing appointment for embezzlement by.—The court of chancery of New Jersey, in the case of *Sorchan v. Maya*,<sup>1</sup> hold that a complainant suing to foreclose a mortgage, who nominates and procures to be appointed as receiver his own solicitor and agent, will be compelled to bear the loss caused by the receiver's defalcation and the insufficiency of his sureties. In this case it was admitted at the hearing that the securities on the receiver's bond were probably worthless, and that the moneys collected by him in his hands would be lost. Under these circumstances the expectant contended that the loss should fall upon the mortgagee, at whose instance, and upon whose nomination, the defaulting receiver was appointed. On the other hand it was contended that the well settled rule is that a mortgagee in such cases is not responsible for the default of the receiver, although such receiver was appointed on his motion and nomination. The court say: "Such seems to be the rule laid down in the text books. Mr. Maddock<sup>2</sup> says: 'Where a receiver is appointed at the instance of the mortgagee the court most generally appoints such person as the mortgagee proposes, unless there is a personal objection to the man; but if such receiver embezzles or otherwise wastes the rents or profits, the loss, it seems, will fall upon the mortgagor, for the receiver is considered as an officer of the court.' And Mr. Kerr<sup>3</sup> says: 'A receiver appointed by the court being appointed on behalf and for the benefit of all persons inter-

<sup>1</sup> 50 N. J. Eq. (5 Dick.) 288; s. c.  
23 Atl. Rep. 479.  
(1416)

<sup>2</sup> Madd. Ch. Pr. 235.

<sup>3</sup> Kerr on Recv. 164.

ested, parties to the suit, if a loss arises from the default of a receiver appointed by the court, the estate must bear it as between the parties to the suit.' To the same effect is Daniel.<sup>1</sup> These authorities all rely upon the single case of *Hutchinson v. Massareene*,<sup>2</sup> except that Mr. Maddock cites in addition the case of *Rigge v. Bowater*.<sup>3</sup> The American treatise follow the English. In *High on Receivers*,<sup>4</sup> and *Beach on Receivers*,<sup>5</sup> the rule is laid down that, 'Inasmuch as the receiver is the officer of the court, and in possession for the benefit of all parties, and not for the plaintiff, at whose instance he was appointed, it follows that the plaintiff should not be held responsible for the losses which result from his wrongful acts or negligence, there being no participation therein or fraud on the part of the plaintiff.'<sup>6</sup> But when we come to examine the cases cited by the English authors we do not find them to support the text to its full extent. The whole of the case of *Rigge v. Bowater*<sup>7</sup> is this: 'The Lord Chancellor intimated his opinion (without deciding the case) that, if a receiver were appointed by the court, upon application of a mortgagee or other incumbrancer, and he afterwards embezzle or otherwise waste the rents and profits, the loss must fall on the mortgagor.' But Mr. Eden, in his note to that case, shows that such rule does not always prevail; and it appears that *Hutchinson v. Massareene*,<sup>8</sup> instead of holding that the loss in such case falls upon the estate, holds precisely the contrary. In *Carter v. Barnadiston*,<sup>9</sup> it was held, on the authority of *Salkelds English King's Bench Re-*

<sup>1</sup> 2 Dan. Ch. Pr. 740, 741.

<sup>2</sup> 2 Ball & B. 55.

<sup>3</sup> 3 Bro. Ch. 365. This decision is referred to in the case of *Hutchinson v. Massareene*, 2 Ball & B. 49, 55, in which the Lord Chancellor says: "I have looked into the case of *Rigge v. Bowater*, 3 Bro. Ch. 365. It is not a decision, but a mere *dictum* of Lord Thurlow; he states that any loss, occasioned by a receiver appointed by the court, at the instance of the

mortgagee, must fall on the mortgagor."

<sup>4</sup> *High on Recv.*, § 270.

<sup>5</sup> *Beach on Recv.*, § 303.

<sup>6</sup> Citing: *Kaiser v. Keller*, 21 Iowa 95; *Ellicott v. United States Ins. Co.*, 7 Gill (Md.) 307, 320; *Downs v. Allen*, 10 Lea (Tenn.) 652; *Terrell v. Ingersoll*, 10 Lea (Tenn.) 77.

<sup>7</sup> 3 Bro. Ch. 365.

<sup>8</sup> 2 Ball & B. 55.

<sup>9</sup> 1 Pr. Wms. 505, 518.



ports,<sup>1</sup> that 'Where one devises land to his executors until his debts are paid, then with remainder over, and the executors misapply the profits, they shall hold only until they might have paid the debts by the profits, and after that the land is to be discharged, and the executors only remain liable.' And in the case of *Hutchinson v. Massareene*,<sup>2</sup> Lord Massareene conveyed land to a trustee nominated by his creditors, in trust, to receive the rents of the real estate for the payment of their debts, and, the trustee having failed to pay over, the loss was directed to be borne by the executors, and the estate was discharged from it.<sup>3</sup> It was held by Lord Eldon, in *Boehm v. Wood*,<sup>4</sup> that, if a person claiming to be entitled to the possession of property as a vendee under a contract deed and mortgage, applies in a suit for the appointment of a receiver, and the receiver be appointed, the possession of the receiver is held to be the possession of the party claiming the right to possession. The cases cited by Mr. Beach in support of his text were not cases of the default of a receiver appointed at the instance of a mortgagee, and are distinguishable from such a case. In one of them—*Terrell v. Ingersoll*<sup>5</sup>—the supreme court of Tennessee, in a case involving the default of a receiver of partnership assets, appointed on the application of one partner, lays down the rule thus: "*Prima facie* the complainant is liable for all losses occasioned by the neglect of the receiver to perform his duty, whether it be in releasing the estate or in accounting for it after it is released. He can shift the burden upon his adversary only by showing that the loss was occasioned by him. The fact that the adversary consents to the appointment of a particular individual as receiver will not change the result, for the receiver is equally the choice of the complainant, and the duty of active diligence still attaches to the latter." But I do not find it necessary to decide the question whether, where an indifferent person is

<sup>1</sup> Anonymous, Salk. 153.

<sup>2</sup> 2 Ball & B. 55.

<sup>3</sup> See Kerr on Recv. 163, to the

<sup>4</sup> 1 Turn. & R. 345; s. c. 12 Eng. Ch. Rep. 332.

<sup>5</sup> 10 Lea (Tenn.) 77.

appointed by the court upon the application of a mortgagee and becomes a defaulter and his sureties are insufficient, the resulting loss should fall upon the mortgagee, and have referred to the authorities only for the purpose of showing that they are not all in accord with the general practice laid down by the text-writers. It is also worthy of remark that the case of a mortgagee, who applies for a receiver, stands on a footing decidedly different from that of a creditor who is working for himself and other creditors, and asks for a receiver to hold the property for the benefit of all the creditors. The mortgagee asks for the rents and profits to be applied to his mortgage, on the ground that he holds the legal title to the premises and is entitled of right to the premises and to receive the rents; and, if he himself were in possession, he would be entitled to hold it, and receive the rents himself, until his debt were paid; and it seems to me that it would be no hardship upon him if the rule were established that he should take the risk of the solvency of the receiver, and that a receiver so appointed should be considered as the agent of the mortgagee. Such a rule would make complainants and their solicitors applying for such appointment careful as to the character of the man whom they nominated to the court, and the responsibility of the sureties given by the appointee. But, whatever may be the rule in ordinary cases, it seems to me that the circumstances of this case render the equity of exceptants quite plain. Here the complainant nominates, procures to be appointed, his own solicitor and agent. None of the owners of the equity of redemption took any part in the proceedings. They were all conducted under the instructions of this agent; and I do not see how the case differs from that of the mortgagee being himself in possession, receiving the rents and profits; and it seems to me that when they were paid to the receiver in this case, they were, in fact, paid to the complainant, and he, in my judgment, must bear the loss. If a mortgagee applies for a receiver and nominates one to the court, he should be careful to nominate one who answers the description of a receiver, namely: 'An indifferent person between the

parties, appointed by the court to receive the rents, issues or profits of land or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it.<sup>1</sup> The receiver appointed in this case was not such a person, the defendant must be credited with the net amount of moneys received by the receiver, without any allowance for commissions."

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<sup>1</sup> Edwards on Recv. 2; citing: Wyatt Pract. Reg. 355; 2 Smith Ch. Pr. 628.

**Kerr on Receivers** says that when a receiver is appointed over an estate that he is to be regarded as the receiver of the party entitled to such estate. See: Kerr on Recv. (Bisph. ed.) 163, citing McCleod v. Phelps, 2 Jur. 962.

**Bispham Approves** this doctrine, and cites in support of the authors' text, Field v. Jones, 11 Ga. 416; Ellicott v. Warford, 4 Md. 85; Ellicott v. United States Ins. Co., 7 Gill. (Md.), 307; State Bank v. The Receivers, 2 Gr. (N. J.), 266.

"Loss arising from fault of Solicitor must be borne by the estate." Under this head in Kerr on Recv. (Bisph. ed.), 164, it is said that "a receiver appointed by the court being appointed on behalf and for the benefit of all persons mentioned, parties to the suit, if a loss arises from the default of the receiver, appointed by the court, the estate must bear it as between the parties to the suit," citing Down v. Duke of Marlborough, 2 Swan. 118; Bainbrigge v. Blair, 3 Beave. 421; Bertroud v. Davies, 31 Beave. 436; Fraser v. Burgess, 13 Mac. P. C. 314; Neato v. Pink, 3 Mac. & G. 476; and Hutchinson v. Massareene, 2 Ball & B. 55.

## CHAPTER XXXI.

### RECEIVER—WHEN WILL BE APPOINTED.

§ 457. Causes for appointing a receiver—Generally.

§ 692. Accounting of receiver.

§ 657. Causes for appointing a receiver—Generally.—The general rule is that on foreclosure proceedings courts of equity have the power to appoint a receiver to preserve, not only the *corpus*, but also the rents and profits, for the satisfaction of the debt, in those cases where the mortgaged property is insufficient security for the debt, the debtor or other person liable is irresponsible for an anticipated deficiency; and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor.<sup>1</sup> The appointment of a receiver is a matter of sound legal discretion,<sup>2</sup> and the better rule to govern that discretion is that which will grant the order of appointment, as it may or may not be an essential means to pay the debt secured by the mortgage.<sup>3</sup> But it is said that a receiver will not be

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<sup>1</sup> See: Haas v. Chicago Building Soc., 89 Ill. 502; Brinkman v. Retzinger, 82 Ind. 364; McCaslin v. State, 44 Ind. 151; Smith v. Kelley, 31 Hun (N. Y.) 388; Burlingame v. Parse, 12 Hun (N. Y.) 48; Ferlinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204; Morris v. Branchaud, 52 Wis. 191; s. c. 8 N. W. Rep. 383; Grant v. Phoenix Mint. L. Ins. Co., 121 U. S. 105; bk. 30, L. ed. 909; s. c. 7 Sup. Ct. Rep. 841.

The party applying must not only satisfy the court that there is a probability that the mortgaged premises will not sell for enough to satisfy the decree, but also that the party

who is thus individually liable is himself irresponsible for the probable amount of such anticipated deficiency, after paying all his other just debts. Morris v. Branchaud, 52 Wis. 191; s. c. 8 N. W. Rep. 383.

<sup>2</sup> Douglass v. Kline, 12 Bush (Ky.) 644; Nichols v. Perry P. A. Co., 11 N. J. Eq. (3 Stock.) 126; Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565.

<sup>3</sup> Myers v. Estell, 48 Miss. 403; Ogdensburgh Bank v. Arnold, 5 Paige Ch. (N. Y.) 39; Clason v. Corley, 5 Sandf. (N. Y.) 447; Schreiber v. Carey, 49 Wis. 208, 213; s. c. 4 N. W. Rep. 124. (1421)

appointed before answer in all those cases where the complaint does not aver that there was any wrongful interference on the part of the defendants with the duties of the trustees, or show what title or interest the plaintiff had, or contain any allegation of insolvency on the part of the defendants, or that there is danger to the property or interests concerned.<sup>1</sup>

§ 692. **Accounting of receiver.**—The court of appeals of New York, *In re Maddock*,<sup>2</sup> say that whether a receiver appointed in a mortgage foreclosure suit to receive the rents of the mortgaged premises *pendente lite* should be required by the court to pay the expense incurred by an adjoining owner in securing an unsafe wall on the mortgaged premises, on failure of the owner and receiver so to do after notice from the fire department, is discretionary with the court appointing the receiver, and no appeal lies from its determination, for the reason that such a case is not covered by the New York Consolidation Act,<sup>3</sup> providing for the recovery of the expense of the work done to secure an unsafe party wall, by direction of the fire department.

<sup>1</sup> *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387; s. c. 21 N. W. Rep. 380; *West v. Swan*, 3 Edw. Ch. (N. Y.) 420; *Simmons v. Wood*, 45 How. (N. Y.) Pr. 269; *Vann v. Bar-*

*nett*, 2 Bro. Ch. 158; *Metcalf v. Pulvertoft*, 1 Ves. & B. 180.

<sup>2</sup> 103 N. Y. 630; s. c. 9 N. E. Rep. 498; 5 Cent. Rep. 791.

<sup>3</sup> N. Y. Acts 1882, c. 410, § 473.



## CHAPTER XXXII.

### PROCEEDINGS ON SURPLUS MONEYS.

PAYING SURPLUS INTO COURT—CHARACTER OF SURPLUS, REALTY OR PERSONALTY—ADJUSTING CLAIMS AND EQUITIES—QUESTIONS OF PRIORITY—LIENS ON SURPLUS—DOWER—MECHANIC'S LIENS.

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| <p>§ 696. Introductory.<br/>700. Payment of surplus into court.<br/>708. Who may apply for surplus.<br/>708a. Same—Assignee for benefit of creditors.<br/>708b. Same—Dower interest.<br/>708c. Same—Grantee or assignee.<br/>708d. Same—Grantor to accommodation maker of notes.<br/>708e. Same—Intervenors.<br/>708f. Same—Judgment creditors.<br/>708g. Same—Lessees of mortgaged premises.<br/>708h. Same—Lienors paying money to protect their liens.<br/>708i. Same — Purchaser at foreclosure sale—When.<br/>708j. Same—Subsequent lienors.<br/>708k. Same — Same — Attachment creditors.</p> | <p>§ 708l. Same—Where foreclosure under power.<br/>708m. Same—Same—Notice of sale.<br/>709. Protecting claims to surplus.<br/>710. Adjusting equities.<br/>711. Liens to be paid in order of priority of time.<br/>712. Questions of priority—How determined.<br/>717. Rights of prior incumbrancers not parties.<br/>719. Equitable priorities between subsequent mortgagees.<br/>733. Married women's equitable right to surplus.<br/>734. Dower in surplus moneys.<br/>735. Inchoate right of dower.<br/>737. Homestead right in surplus.<br/>742. Rights of <i>cestius que trust</i> in surplus.</p> |
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§ 696. Introductory.—The money arising from the sale of mortgaged premises which remains after paying the cost and expenses and the mortgage debt is known as surplus money, and is disposed of according to well settled rules, Hence, the formal directions in a deed of trust as to the application of the surplus in case the property is sold to satisfy the debt are generally superfluous as the law itself directs the application.<sup>1</sup>

In a case where one of several joint owners conveys his interest to the others who have given a mortgage upon the

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<sup>1</sup> Re Thompson, 6 Mackey (D. C.) 536; s. c. 13 Cent. Rep. 459.  
(1423)

whole property, and waives, in favor of their creditor, his privilege and mortgage for the purchase price upon the sale of the property to pay such mortgage debt, the creditor, after the full satisfaction of his debt, cannot apply the balance to a subsequent mortgage in his favor.<sup>1</sup> And a mortgagee who has bid in the land on foreclosure under a judgment for more than the debt, and who, pending an action to reform the judgment, demanded and received a deed, thus electing to hold the land, is liable in an action by the person whose land was sold, and who elects to affirm the sale, for the excess of the amount of the judgment above what he was entitled to, where the judgment has been reformed, showing such excess.<sup>2</sup>

The supreme court of the District of Columbia say that where land is sold by the trustees during the mortgagor's life, the surplus, after satisfying the debt, is payable to him, or, if he dies before the time of payment, to his executors, administrators, or assigns. If it is sold after his death intestate, it is payable to his heirs.<sup>3</sup>

§ 700. *Payment of surplus into court.*—The general rule is that the surplus arising on the sale of property on mortgage foreclosure, is to be paid into court to be distributed as the court shall direct. And the surplus in the hands of a mortgagee may be recovered at law, as well as in equity; and the statute of limitations will apply to the right of recovery without demand; and the pendency of an action to set aside an alleged fraudulent conveyance of the equity of redemption will not suspend the statute.<sup>4</sup>

The supreme court of Louisiana, in the case of *Tessier v. Burgeois*,<sup>5</sup> say that the purchaser of immovable property of an insolvent succession, sold under executory process, cannot retain the balance of the purchase price, after satisfaction of

<sup>1</sup> *Reggio v. McCan*, 40 La. An. 479; s. c. 4 So. Rep. 478.

<sup>2</sup> *Mitchell v. Weaver*, 118 Ind. 55; s. c. 20 N. E. Rep. 525.

<sup>3</sup> *In re Thompson*, 6 Mackey (D.C.) 536; s. c. 13 Cent. Rep. 459.

<sup>4</sup> *Reynolds v. Hennessy*, 15 R. I. 513; s. c. 8 Atl. Rep. 715; 1 N. Eng. Rep. 863.

<sup>5</sup> 38 La. An. 256.

the claim of the seizing creditor, for payment of other mortgages and liens, unless there are special mortgages of inferior rank existing against the property, or unless he is threatened with eviction by the holders of general mortgages affecting the property. But in the more recent case of *Morris v. Cain*,<sup>1</sup> the court say that a purchaser at foreclosure sale under proceedings for the collection of one of a series of mortgage notes is entitled to retain the surplus beyond the amount taken under the writ of sale until it is demanded by the owners of the remainder of the series. But he is liable for interest at the rate of five per cent. per annum until such surplus is paid over or deposited.<sup>2</sup>

It is thought the court may in certain cases require the surplus money to be invested in a given way; and where a direction is given for such investment no partial compliance with the order of court, without showing good reason for failure to render strict obedience to the order, will release from liability for failure to comply with the court's order.

§ 708. Who may apply for surplus.—In the absence of any other liens or claims, the surplus arising from the sale of mortgaged premises belongs to the mortgagor or the owner of the equity of redemption;<sup>4</sup> but in those cases where there has been a transfer of title by a mortgagor after a foreclosure sale, this does not transfer the right to the surplus arising on such sale.<sup>5</sup> And the supreme court of Ohio, in the case of *Hubbard v. Elden*,<sup>6</sup> say that where,

<sup>1</sup> 39 La. An. 712; s. c. 2 So. Rep. 418.

<sup>2</sup> *Id.*

<sup>3</sup> *Hubbard v. Elden*, 43 Ohio St. 380; s. c. 2 N. E. Rep. 434; 1 West. Rep. 331.

<sup>4</sup> *Day v. New Lots*, 107 N. Y. 148; s. c. 13 N. E. Rep. 915; 9 Cent. Rep. 440. See: *Mattel v. Conant*, 156 Mass. 418; s. c. 31 N. E. Rep. 487; *Fagan v. People's Sav. & L. Assoc.*, 55 Minn. 437; s. c. 57 N. W. Rep. 142; *Gair v. Tuttle*, 49 Fed. Rep. 198.

Under a mortgage providing that the surplus arising from fore-

closure sale be paid to the mortgagor or his assigns, the mortgagee is liable for such surplus to grantees of the mortgagor who were owners of the property at the time of the sale, notwithstanding they are strangers to the contract between the mortgagor and mortgagee. *Mattel v. Conant*, 156 Mass. 418; s. c. 31 N. E. Rep. 487.

<sup>5</sup> *Clyde v. Johnson*, 4 N. D. 92; s. c. 58 N. W. Rep. 512.

<sup>6</sup> 43 Ohio St. 380; s. c. 2 N. E. Rep. 434; 1 West. Rep. 331.

on a sale of mortgaged premises, there remains in the hands of the sheriff a portion of the proceeds, and disputed claims for such balance are pending, the sheriff and his bondsmen are liable for his failure to pay the same to the rightful claimant, although not demanded until after his term expires. All liens upon the mortgaged premises, which are inferior to the lien foreclosed, will be transferred to the surplus arising from the foreclosure sale.<sup>1</sup> Hence, ordinarily, all persons holding such inferior liens will be entitled to participate in the distribution of the surplus.<sup>2</sup>

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<sup>1</sup> *Fagan v. People's Sav. & L. Assoc.*, 55 Minn. 437; s. c. 57 N. W. Rep. 142.

<sup>2</sup> *Brown v. Campbell*, 100 Cal. 635; s. c. 35 Pac. Rep. 433; *Kauffman v. Peacock*, 115 Ill. 212; s. c. 3 N. E. Rep. 749; 2 West. Rep. 41; *Clapp v. Hadley*, 141 Ind. 28; s. c. 39 N. E. Rep. 504; *Denegre v. Mushet*, 46 La. An. 90; s. c. 14 So. Rep. 348; *Kent v. Mellus*, 69 Mich. 71; s. c. 37 N. W. Rep. 48; 13 West. Rep. 732; *Fagan v. People's Sav. & L. Assoc.*, 55 Minn. 437; s. c. 57 N. W. Rep. 142; *Brown v. Crookston Agricultural Assoc.*, 34 Minn. 545; s. c. 26 N. W. Rep. 907; *Hooper v. Castetter*, 45 Neb. 67; s. c. 63 N. W. Rep. 135; *Blass v. Terry*, 87 Hun (N. Y.) 563; s. c. 34 N. Y. Supp. 475; *Quackenbush v. O'Hare*, 61 Hun (N. Y.) 388; s. c. 40 N. Y. S. R. 797; 16 N. Y. Supp. 33, aff'd in 129 N. Y. 485; s. c. 29 N. E. Rep. 958; 42 N. Y. S. R. 104; *Page v. Thomas*, 43 Ohio St. 38; s. c. 1 N. E. Rep. 79; 1 West. Rep. 24; *Stewart v. Groce*, 42 S. C. 500; s. c. 20 S. E. Rep. 411; *Farmers' Loan & T. Co. v. Oregon & W. T. R. Co.*, 67 Fed. Rep. 404.

Six month clause for presenting claims—Abrogation by courts.—The supreme court of the United States say that where the decree of

sale of mortgaged property provides for the payment of demands by the purchaser, and that demands which are not presented within six months after the confirmation of the sale shall be barred, and the decree of confirmation contains no such limitation as to time, a claimant may present his demands after the lapse of more than six months. *Olcott v. Headrick*, 141 U. S. 543; bk. 35 L. ed. 851; s. c. 12 Sup. Ct. Rep. 81.

Also that where a fund arising from a sale of property is in court, the court may abrogate the limitation of six months provided by the decree of sale for the presentation of claims, and permit a creditor to prove his debt after the expiration of said six months. *Id.*

A statute providing that railroad mortgages shall be invalid against debts contracted in carrying on the business of the company, has been said not to give a prior lien to the latter's claims, but merely prevents those claiming a prior lien under a mortgage from setting it up to defeat such debts. *Farmers L. & T. Co. v. Vicksburg & M. R. Co.*, 33 Fed. Rep. 778.

Same—Current debts of a company in operation of its current business are chargeable upon the current

§ 708a. Same—Assignee for benefit of creditors.—The court of chancery of New Jersey, in the case of *Babbitt v. McDermott*,<sup>1</sup> say that the assignee for creditors of an insolvent mortgagor of a hotel, who, in furtherance of a scheme for making the hotel furniture, over which no one else has any control, produce a revenue by its use in connection with the real estate, makes payments to be applied upon the mortgage out of the net revenue of the property produced by such scheme, is not entitled to surplus moneys arising from foreclosure of the mortgage, although such payments were not applied thereon, where such amounts were in fact rental of the real estate and not all of the rents which he agreed to pay, since he is under no obligations to see that such rent is applied to reduce the mortgage, and its not being so credited does not affect the sum realized by him as assignee.

§ 708b. Same—Dower interest.—It is thought that a wife joining with her husband in execution of a mortgage, on sale to satisfy the mortgage, loses her contingent interest in the premises; and an excess in the amount realized is properly applied to the husband's debts.<sup>2</sup>

income, as against holders of mortgage bonds of the company, whether they accrued before or after appointment of a receiver. *Farmers' L. & T. Co. v. Vicksburg & M. R. Co.*, 33 Fed. Rep. 778.

The supreme court of the United States say, in *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 125 U. S. 658; bk. 31 L. ed. 832; 8 Sup. Ct. Rep. 1011, that mortgage securities upon which current earnings of an insolvent railroad company are applied before current expenses are paid, are chargeable in equity with restoration of the fund so misapplied.

A lessee applying the earnings of the road on mortgage bonds, leaving the rent unpaid, the equity of the lessor, if it exists, is against the

holder of such first-mortgage bonds, and not against the proceeds on foreclosure sale of the railroad. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 125 U. S. 653; bk. 31 L. ed. 832; s. c. 8 Sup. Ct. Rep. 1011.

And where a lessor receives, in payment of rent, more than the entire net earnings of the property, has no equitable ground for payment of the amount due for rent out of the fund arising from foreclosure sale, in preference to prior mortgages. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 125 U. S. 658; bk. 31 L. ed. 832; s. c. 8 Sup. Ct. Rep. 1011.

<sup>1</sup> 26 Atl. Rep. (N.J. Ch. 1893) 889.

<sup>2</sup> *Kauffman v. Peacock* 115 Ill. 212; s. c. 3 N. E. Rep. 749; 2 West. Rep. 41.



§ 708c. **Same—Grantee or assignee.**—The supreme court of New York, in the case of *Blass v. Terry*,<sup>1</sup> say that the grantee of an undivided half of land who assumes in her deed payment of the half of a mortgage thereon is entitled to the benefit of half the proceeds of a sale of the property as an entirety under foreclosure, in reduction of her share of the mortgage debt. But the Indiana supreme court have held that an assignee of an equity of redemption in premises on which there is a school-fund mortgage, has no interest in the surplus realized upon a sale of the land, under the Indiana statute,<sup>2</sup> providing that the surplus shall be paid to the original mortgagor, “his heirs or assignees,” when collected, where he has executed an irrevocable power of attorney, coupled with an interest, empowering the agent to sell his interest in the land, and the agent has sold such interest before the assignee made any attempt to revoke the power of attorney.<sup>3</sup>

§ 708d. **Same—Grantor to accommodation maker of notes.**—The supreme court of Mississippi, in the case of *Wooldridge v. Bowmar*,<sup>4</sup> say that where the real debtor conveyed land to an accommodation maker of notes for his benefit, in order that a mortgage might be given upon it as security for the notes, neither he, his assignee for creditors, nor a receiver of his assets, is entitled, on account of notes which he has taken up and retained in his possession, on foreclosure of the mortgage, to share with the holder of the rest of the notes in the distribution of the proceeds.

§ 708e. **Same—Intervenors.**—It is thought that to sustain the claim of an intervenor to share in the proceeds of a railroad mortgage upon coupons which he has paid to the holder, such payment must have been made upon a distinct understanding with the holders of the bonds to which such

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<sup>1</sup> The same is said to be true of the surplus in the hands of a trustee vested with the power to sell. *Kauffman v. Peacock*, 115 Ill. 212; s. c. 3 N. E. Rep. 749; 2 West. Rep. 41.

<sup>2</sup> 87 Hun (N. Y.) 563; s. c. 34 N. Y. Supp. 475.

<sup>3</sup> Ind. Rev. Stat., 1881, § 4394.

<sup>4</sup> *Bell v. Corbin*, 136 Ind. 269; s. c. 36 N. E. Rep. 23.

<sup>5</sup> 64 Miss. 34; s. c. 8 So. Rep. 233.

coupons belonged, that they were purchased and not discharged.<sup>1</sup>

§ 708f. **Same—Judgment creditors.**—It is said, in the case of the Central Trust Company v. Cincinnati, Jackson & Mackinaw Railroad Company,<sup>2</sup> that judgments which, under a reorganization agreement are to be treated as first mortgage bonds, and taken up by bonds issued by the new company, are equally extinguished with the old bonds, and not entitled to share in distribution of a surplus upon mortgage foreclosure of the property of the old company, where such reorganization agreement contemplates the total extinguishment of the old bonds.

§ 708g. **Same—Lessees of mortgaged premises.**—The supreme court of New York, in the case of Larkin v. Misland,<sup>3</sup> say that lessees whose right of occupation is destroyed by foreclosure have no claim therefor against surplus moneys, except in those cases where the annual value of the leasehold exceeds the rent. In delivering the opinion of the court in this case, Judge Finch says:

“ This order should be affirmed, solely for the reason that Agnes Misland did not show the value of her leasehold estate in excess of the rents reserved, or that it had any such value. We may grant that the lease which she produced from Louisa was duly delivered, and that there was possession under it, and, so, that she was entitled to be first paid out of the surplus the value of her leasehold estate, before any part of such surplus should go to the lessor as owner of the equity of redemption. But the difficulty remains that there is no sufficient proof of any such value, and, so, no basis for an award to the lessee.

“ The whole subject was fully discussed in Clarkson v. Skidmore.<sup>4</sup> It was there explained that the value of the leasehold estate, the sum lost by its destruction, is what it is worth over and above the rent reserved. If its value

<sup>1</sup> Farmers' Loan & T. Co. v. Oregon & W.T. R. Co., 67 Fed. Rep. 404,

<sup>2</sup> 58 Fed. Rep. 500.

<sup>3</sup> 100 N. Y. 212; s. c. 3 N. E. Rep. 79; 1 Cent. Rep. 290.

<sup>4</sup> 46 N. Y. 301.

does not exceed such rents, no loss results from an abridgement of the term. The occupation lost and the rental saved, balance each other. But if the estate is worth something over and above the rental, that excess is lost by the destruction of the term. In this case no such excess of value was in any manner established. The amount of the rent reserved was not shown. It consisted of a sum equal to the interest on incumbrances, the number and amount of which we do not know, and to the insurance premiums, taxes and water-rents. What this annual rental in money amounted to, and how it compared with the actual annual value of the leasehold estate, is undisclosed, and so no basis existed for estimating a possible loss resulting from the extinction of the lease and to which Agnes was entitled as compensation out of the surplus realized. The only fact shown was that value remained in the fee over and above the incumbrances, as indicated by the result of the foreclosure sale. But the case already cited determines that while the surplus realized may be an element in estimating the value of the leasehold, yet the interest upon such surplus is not that value. It in no respect concludes the lessee, and so should not conclude the lessor. In the absence of proof to the contrary, the rents reserved must be presumed to be the fair annual value of the use of the land, and that the fee is worth more than the incumbrances, as shown by a foreclosure sale, does not rebut or destroy that presumption, for the interest upon the value of the fee is much less likely to measure justly the value of the use than the rental agreed upon by the parties as the fair value of such use."

§ 708h. Same—Lienors paying money to protect their liens.—It is a well-established principle that where a lienholder is compelled to expend money for the purpose of protecting his lien against a paramount claim, he is entitled to be subrogated to the right of the person holding such paramount claim, and where the mortgaged property is sold to satisfy another paramount lien or claim, the lienor thus expending money will have his right to be reimbursed

for such necessary expenditure transferred from the property to the surplus, if any, arising from the sale of the premises. Thus, it has been said by the circuit court of the United States for the northern district of Ohio that moneys paid by a reorganization committee of the bondholders and stockholders of a railroad, who purchase the road upon foreclosure sale, for the purpose of clearing off liens upon the railroad prior to their bonds, are not a debt which is entitled to participate in surplus moneys arising from the sale of the property subject to the lien therefor, but the payment thereof is a payment which extinguishes it, and not a purchase leaving the debt alive in the hands of the new company.<sup>1</sup>

§ 708i. Same—Purchaser at foreclosure sale, when.—The supreme court of Louisiana, in the case of *Denegre v. Mushet*,<sup>2</sup> hold that the purchaser at a foreclosure sale under a senior mortgage has the right to retain any surplus and pay it over to subordinate mortgagees upon their presenting themselves; and a judgment creditor has no right upon such surplus entitling him to call other creditors holding special mortgages into court for the purpose of a distribution thereof. In this case it was claimed that the proceedings partook of the nature of a concursus under the Louisiana statute,<sup>3</sup> and resembles a tabulation of distribution to which oppositions have been filed, which are open to every objection of law and fact.<sup>4</sup> The court declared that it was “only a conflict of privilege between creditors” the statute contemplates, or which authority is conferred upon courts to classify “according to their rank” in the summary manner pointed out, declaring that the statute does not purport to give the courts jurisdiction to summarily adjudge the validity of debts which are secured by privileges or mortgages, and by that means to displace one and advance the rank of another. Continuing the discussion, the court say:

<sup>1</sup> *Central Trust Co. v. Cincinnati, J. & M. R. Co.*, 58 Fed. Rep. 500.

<sup>2</sup> 46 La. An. 90; s. c. 14 So. Rep. 345.

<sup>3</sup> La. Rev. Stat., § 1942; Code Pr., Art. 126.

<sup>4</sup> Citing: *Bank v. Tureaud*, 40 La. An. 193; s. c. 3 So. Rep. 538; *Suc-*

“The case of *Bank v. Smith*,<sup>1</sup> presents a somewhat similar question, though it was a direct action, instituted by purchasers of the mortgaged property at sheriff's sale made in foreclosure proceedings in the collection of one of a series of several notes secured by the same mortgage, they having retained in their bonds the ‘remainder (of the price) to pay their incumbrances.’ The suit was accompanied by an injunction, and it had for an object the prevention of a sale sought to be made in executory proceedings by the concurrent mortgagees. Of these proceedings the court said that the various holders of the concurrent mortgage notes ‘under which the property was sold were made parties to a kind of concursus.’ In *Morris v. Cain*,<sup>2</sup> in which intervenors, among other things, claimed the right, as purchasers of the mortgaged property, to have certain other mortgages thereon canceled and erased,—of the character of this proceeding, the court said: ‘We have no concursus before us;’ and in treating of this right to proceed as they had done, they further say: ‘There can be no doubt that a purchaser at a judicial sale has the right of disincumbering the property adjudicated to him in the same manner as the expropriated owner could have done had he not been divested of ownership by the seizure and sale; that is, by paying the creditors to secure whose claims the property was burdened. But although this right is co-extensive, it is not greater; and the obligation of payment, to which the purchaser may have subjected himself by retaining a portion of the price, is not the same.’ The court say the course pursued by the purchaser in that case is not sanctioned by law or precedents; citing also the case of *Tessier v. Bourgeois*<sup>3</sup> to enforce the conclusion that in the case under consideration was not one of concursus.

§ 708j. **Same—Subsequent lienors.**—The universal rule is that upon the sale of land subject to two mortgages, under the first, the lien of the second is transferred from

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cession of Aaron, 11 La. An. 671;

Succession of Lerude, 11 La. An.

386.

<sup>1</sup> 27 La. An. 59.<sup>2</sup> 34 La. An. 657.<sup>3</sup> 38 La. An. 256.



the land to the surplus of the proceeds after satisfying the first mortgage;<sup>1</sup> and the mortgagee is entitled to such sur-

<sup>1</sup> *Fagan v. People's Sav. & L. Assoc.*, 55 Minn. 437; s. c. 57 N. W. Rep. 142; *Brown v. Crookston Agricultural Assoc.*, 34 Minn. 545; s. c. 26 N. W. Rep. 907. See: *Patton v. Thomson*, (Cal. 1893), 33 Pac. Rep. 97; *Clapp v. Hodley*, 141 Ind. 28; s. c. 39 N. E. Rep. 504; *Kent v. Mellus*, 69 Mich. 71; s. c. 37 N. W. Rep. 48; 13 West. Rep. 732; *Hooper v. Castetter*, 45 Neb. 67; s. c. 63 N. W. Rep. 135; *Quackenbush v. O'Hare*, 61 Hun (N. Y.) 388; s. c. 16 N. Y. Supp. 33; 4 N. Y. S. R. 797, aff'd 129 N. Y. 485; s. c. 29 N. E. Rep. 958; 42 N. Y. S. R. 104; *Stewart v. Grace*, 42 S. C. 500; s. c. 20 S. E. Rep. 411.

**Second mortgagee in preference to the mortgagor**, is entitled to receive the surplus money arising from foreclosure sale under a prior mortgage. *Brown v. Crookston Agri. Asso.* 34 Minn. 545; s. c. 26 N. W. Rep. 907.

**Bonds issued by a railroad company are not entitled to participate in a surplus** arising on foreclosure of one division of the road, as to a deficiency upon the sale of the other division under the mortgage made to secure such bonds, in those cases where the bondholders are stockholders of the old road and have pooled their securities for the purpose of buying the road and reorganizing it, and have agreed among themselves that in exchange for their old securities they will receive securities to be issued by the new company, with the intention that the old bonds should be considered extinguished, since such agreement when consummated operates to extinguish the bonds, not only as between the parties thereto, but as

to the old road and its other creditors. *Central Trust Co. v. Cincinnati, J. & M. R. Co.*, 58 Fed. Rep. 500.

**In California, under Code of Civil Proceedings, § 957**, on a foreclosure sale of lands to a junior mortgagee, a decree of foreclosure in whose favor on his cross-complaint for any excess was reversed because his cross-complaint was not served on his mortgagors, the latter cannot recover from the junior mortgagee the excess of the first proceeds of the sale over the amount of the first mortgage under which the sale was had, where the record does not show that the excess is not held by the sheriff subject to the order of the mortgagors. *Patton v. Thomson*, (Cal. 1893), 33 Pac. Rep. 97.

**In Michigan** an assignee of a second mortgage claiming the surplus under a prior mortgage, must show that he purchased in good faith for value the interest claimed by him in the mortgage, without notice of its invalidity. *Kent v. Mellus*, 69 Mich. 71; s. c. 37 N. W. Rep. 48; 13 West. Rep. 732.

**In New York the surplus money** arising from the sale of mortgaged premises under foreclosure must be paid to the holder of the legal title to a junior mortgage, although another person is equitably entitled to a transfer thereof. *Quackenbush v. O'Hare*, 61 Hun (N. Y.) 388; s. c. 40 N. Y. S. R. 797; 16 N. Y. Supp. 33, aff'd in 129 N. Y. 485; s. c. 42 N. Y. S. R. 104; 29 N. E. Rep. 958.

**The mortgagee of an individual member of a firm** is only entitled to the surplus after payment of the partnership debts. *Page v. Thomas*, 43

plus to the extent necessary to satisfy his mortgage, although by its terms his debt is not due.<sup>1</sup> On the same principle the surplus arising from a sale of lands under a second mortgage must be used for paying junior liens, and not the first mortgage, even though the land is sold for its full value.<sup>2</sup>

The supreme court of Indiana, in the case of *Clapp v. Hadley*,<sup>3</sup> hold that a mortgagee in a second mortgage, who holds a certificate of purchase at a foreclosure sale thereunder, at which he bid the full amount of principal, interest and costs, is entitled to a lien for the payment of the debts secured by such mortgage upon the surplus arising from a subsequent sale under the first mortgage, of which he was also the owner, although the decrees under both mortgages were obtained at the same time, and no provision was made in either for the distribution of the surplus moneys. But the supreme court of Nebraska, in the case of *Hooper v. Castetter*,<sup>4</sup> say the holder of a second mortgage on land, who becomes the purchaser on the foreclosure of his mortgage, to which action the holder of the first mortgage is not made a party, is not entitled, as against the mortgagor, by taking an assignment of the first mortgage after obtaining his decree, but before the sale, to a decree applying the surplus proceeds of the sale towards the liquidation of the mortgage purchased.

Ohio St. 38; s. c. 1 N. E. Rep. 79; 1 West. Rep. 24

<sup>1</sup> *Fagan v. People's Sav. & L. Assoc.*, 55 Minn. 437; s. c. 57 N. W. Rep. 142.

<sup>2</sup> *Stewart v. Groce*, 42 S. C. 500; s. c. 20 S. E. Rep. 411.

**Second mortgagee acts at his peril** in paying the surplus to the first mortgagee, under a mortgage containing a power of sale and authorizing the mortgagee to pay over the surplus to the holders of subsequent liens who give express written notice of the liens, and, if none is given, to the mortgagors, where he has notice of a third mortgage, although no written

notice of the lien is given. *Stewart v. Groce*, 42 S. C. 500; s. c. 20 S. E. Rep. 411.

But the receipt by a third mortgagee, with full knowledge of all the facts, of a part of the surplus moneys arising from a sale by the second mortgagee and paid over by him to the first mortgagee, releases the second mortgagee from liability for the amount so received, but no more. *Stewart v. Groce* 42 S. C. 500; s. c. 20 S. E. Rep. 411.

<sup>3</sup> 141 Ind. 28; s. c. 39 N. E. Rep. 504.

<sup>4</sup> 63 N. W. Rep. 135.

§ 708k. **Same—Same—Attachment creditors.**—Lienors other than mortgagors are entitled to apply for and share in the surplus. Thus it is held that a valid attachment levied upon the equity of redemption and the entire interest of the debtor in lands described in a prior trust deed or mortgage, before a foreclosure sale thereunder, becomes a lien on any surplus proceeds arising from such sale; and such surplus is subject to be applied, upon execution, to the satisfaction of judgment in favor of the attaching creditor.<sup>1</sup>

§ 708l. **Same—Where foreclosure under power.**—The rules governing the right to and distribution of the surplus arising on a foreclosure sale under a power contained in a trust deed or mortgage, are the same as upon foreclosure by action. Consequently, a mortgagee who has sold the mortgaged premises under a power of sale, cannot successfully set up the defense of liability to a second mortgagee, in an action by the mortgagor or his executors for the surplus, unless he has discharged the liability by payment of the money to such mortgagee.<sup>2</sup> It has been said that in those cases where the undertaking on the mortgagee's part is to account to the mortgagors and their heirs and assigns for surplus money arising from sale under power in the mortgage, is an undertaking to pay mortgagors jointly; and an action to recover the surplus must be joint.<sup>3</sup> And where land has been mortgaged by one not holding the title, the beneficiaries may affirm the sale by the mortgagee and recover the proceeds in his hands.<sup>4</sup>

A sale under a trust deed, to be valid, must be made in strict accordance with the terms of such power.<sup>5</sup> Hence, an agreement and assurances made by a trustee in a trust deed, that the surplus may be applied upon debts of the

<sup>1</sup> Brown v. Campbell'o. 10 Cal. 635; s. c. 35 Pac. Rep. 433.

<sup>2</sup> Mortgage Co. v. Inzer, 98 Ala. 608; s. c. 13 So. Rep. 507.

<sup>3</sup> Clapp v. Pawtucket Inst. for Sav., 15 R. I. 489; s. c. 8 Atl. Rep. 697;

4 N. Eng. Rep. 27.

<sup>4</sup> The trustee entitled to retain expenses of sale and any payments made for the purpose of the trust. Re Champion (C. A.), 1893, 1 Ch. 101. See: *Post*, § 845.

<sup>5</sup> See: *Ante*, § 264h.

mortgagor, when the trust deed expressly provides that it shall be paid to the mortgagor, is not valid; and such agreement is not ratified by the mortgagor's bringing suit against the purchaser for the surplus.<sup>1</sup>

§ 708m. **Same—Same—Notice of sale.**—On a foreclosure under a power, the notice of sale should accurately state the amount due on the mortgage, and for the payment of which the premises are to be sold. Should the mortgagee, in his notice of sale, claim to be due an amount greater than that allowed by the terms of the mortgage or trust deed, and bids in the mortgage for the amount claimed to be due, he will be liable to the mortgagor or his assignee for the excess for which the premises sold over the amount actually due.<sup>2</sup> And it is said by the supreme court of Minnesota that, where there is a mistake in the computation of the interest due on a note secured by mortgage, and a larger sum is claimed in the notice of sale than is lawfully due, and the premises are bid in by the mortgagee, for the sum so claimed, in good faith, believing himself to be bidding only for the sum actually due, and the mortgagor is attempting to recover, by action, as surplus, the excessive interest so computed and included in the bid, and the premises are of less value than the sum actually and legally due, equitable relief may be granted the mortgagee, and a resale ordered.<sup>3</sup>

§ 709. **Protecting claims to surplus.**—The surplus

<sup>1</sup> Gair v. Tuttle, 49 Fed. Rep. 198. See: *Post*, § 749.

<sup>2</sup> Fagan v. People's Sav. & L. Assoc., 55 Minn. 437; s. c. 57 N. W. Rep. 142. See: *Post*, § 788.

<sup>3</sup> Lane v. Holmes, 55 Minn. 397; s. c. 57 N. W. Rep. 132.

**Value of the use of the mortgaged premises,** upon ordering a resale of premises sold under mortgage foreclosure to the mortgagee for a sum in excess of the amount actually due, under a mistake in the computation of interest by which the bid

was so increased, for the time they are occupied after the foreclosure and the expiration of the time for redemption, by the mortgagee in actual possession with the actual or implied assent of the mortgagor, need not be tendered to the latter before such resale, since the mortgagee, being in possession after condition broken, is rightfully there, and the mortgagor could not recover possession without satisfying the mortgage. Lane v. Holmes 55 Minn. 397; s. c. 57 N. W. Rep. 132.

arising on a foreclosure sale will be carefully protected by the court for those who are entitled to share therein. Thus, the supreme court of Pennsylvania, in the case of *Lynn v. Freemansburg Building and Loan Association*,<sup>1</sup> say that in *scire facias* on a mortgage to a building association, fines under an invalid by-law must be applied on the amount due.

§ 710. **Adjusting equities.**—The court will adjust the equities between lienors whenever they can be established. The general rule is that, in foreclosure proceedings, the amount due on the mortgage, and the rights of the parties, are to be determined as of the date of the judgment or decree,<sup>2</sup> but the proceeds must be applied to the payment of mortgage claims according to their respective ranks, to be ascertained by the dates of registry.<sup>3</sup> But where a note has been transferred, together with a mortgage given to secure it and other notes, the transferee is entitled to priority in the distribution of the proceeds of a sale under the mortgage.<sup>4</sup> And it is thought that the assignment to different persons of two promissory notes coming due at different times, secured by a mortgage, entitles each of the assignees to a *pro rata* application of the proceeds of the mortgaged premises, where the sum realized from their sale is insufficient to pay the notes in full.<sup>5</sup>

But in those cases where a mortgage is given to secure several notes maturing at different times, some of which are otherwise secured, the proceeds arising from a sale of the mortgaged premises will be first applied in payment of notes which are not otherwise secured, although ~~such~~ notes are not the first to mature, where the payee and mortgagee

<sup>1</sup> 117 Pa. St. 1; s. c. 11 Atl. Rep. 537; 20 W. N. C. 185; 9 Cent. Rep. 360.

<sup>2</sup> *Clark v. Clark*, 62 N. H. 267.

<sup>3</sup> *Reusch v. Keenan*, 42 La. An. 414; s. c. 7 So. Rep. 589. See: *Post*, § 711.

<sup>4</sup> *Miller v. Washington Sav. Bank*, 5 Wash. 200; s. c. 31 Pac. Rep. 712.

<sup>5</sup> *Aberdeen First Nat. Bank v.*

*Andrews*, 7 Wash. 261; s. c. 34 Pac. Rep. 913; *Lovell v. Craig*, 136 U. S. 130; bk. 34 L. ed. 372; s. c. 10 Sup. Ct. Rep. 1024.

An hypothecary action lies in Louisiana to enforce such claim. *Lovell v. Cragin*, 136 U. S. 130; bk. 34 L. ed. 372; s. c. 10 Sup. Ct. Rep. 1024.



indorsed the two notes first maturing as an additional security in order to induce the assignee to purchase them<sup>1</sup> And one who transfers a note secured by mortgage, under an agreement to pay the transferrer interest due at the time of transfer, "when the same should be collected on said note and mortgage," without any other qualification, is entitled to receive the interest out of the first moneys, realized from foreclosure sale, after the payment of the costs and expenses thereof.<sup>2</sup>

It has been said by the supreme court of Michigan, in the case of *High v. American Wheel Company*,<sup>3</sup> that one of several persons whose claims for both existing indebtedness and liability as indorser are secured by a trust mortgage, but who has received a part of the amount due on one claim from other sources, is not obliged to deduct the amount so received from the amount originally secured in order to obtain the amount on which he is entitled to a dividend on each claim, where the property is insufficient to pay all the claims in full, but he is entitled to a dividend on each claim for its total amount as secured by the mortgage, subject to the proviso that this should not exceed the amount actually remaining due on such claims.

The supreme court of Virginia, in the case of *Mosley v. Johnson*,<sup>4</sup> say that where the trustees under a trust deed, sell without authority some of the trust property, they may be compelled to pay into court the value of the property sold, out of which the creditors must first be paid; and the surplus, if any, will be returned to the debtor or to his representatives.

The supreme court of New York, in the case of *Shaw v. Saranac Horse Shoe Nail Company*,<sup>5</sup> say that the purchasers at their par value of the bonds of a corporation issued for the purpose of raising money to pay its floating

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<sup>1</sup> *Robinson v. Waddell*, 53 Kan. 402; s. c. 36 Pac. Rep. 730.

<sup>2</sup> *Haber v. Brown*, 101 Cal. 445; s. c. 35 Pac. Rep. 1035.

<sup>3</sup> 37 Mich. 502; s. c. 56 N.W. Rep. 927; 21 L. R. A. 822.

<sup>4</sup> 86 Va. 429; s. c. 10 S. E. Rep. 425; 13 Va. L. J. 872.

<sup>5</sup> 78 Hun (N. Y.) 7; s. c. 29 N. Y. Supp. 254; 60 N. Y. S. R. 804.

debts, and which are authorized to be sold at a price not less than par, have an equity in the proceeds realized from the foreclosure of the mortgage given to secure the bonds, superior to that of a stockholder who has agreed to pay the debts of the corporation after its insolvency has been recognized, and has taken assignments of bonds that had been given as security for past-due notes, instead of being sold for their par value as provided for, for the purpose of contribution from the other stockholders.

The chancery court of New Jersey, in the case of *Point Breeze Ferry and Improvement Company v. Bragaw*,<sup>1</sup> say that on the foreclosure of a mortgage given by a riparian owner, covering the shore and including the land lying under water in front of the upland, which was afterwards leased from the state and improved by filling below high-water mark, the lessee has a higher title and superior right to be first paid the price of the lease and the value of the improvement.<sup>2</sup>

§ 711. Liens to be paid in order of priority of time. —The surplus arising on the foreclosure of a mortgage is to be applied towards the discharge of junior liens<sup>3</sup> in the order of their priority,<sup>4</sup> and this priority is to be ascertained by the date of registry,<sup>5</sup> judgment or decree.<sup>6</sup> But the supreme court of Florida, in *Edwards v. Thom*,<sup>7</sup> say that a *bona fide* mortgagee who has been made a party defendant with the mortgagor to a bill filed to foreclose a duly recorded prior mortgage, and has become the purchaser at the sale made under a decree in such a suit, is entitled to priority of payment out of the excess of the proceeds of sale, as against a mortgage executed before his but not

<sup>1</sup> 47 N. J. Eq. (2 Dick.) 298; s. c. 20 Atl. Rep. 967.

<sup>2</sup> As to rights of riparian mortgage in strip of land under water reclaimed after execution of mortgage. See: *Ante*, § 256.

<sup>3</sup> Prior lienors are not entitled to share in surplus. *Scheffelman v.*

*Fuerth*, 87 Mo. 351; s. c. 3 West. Rep. 239. See: *Post*, § 717.

<sup>4</sup> *Re Ferguson's Estate* (Mo. 1894), 27 S. W. Rep. 513.

<sup>5</sup> *Rensch v. Keenan*, 42 La. An. 419; s. c. 7 So. Rep. 589.

<sup>6</sup> *Clark v. Clark*, 62 N. H. 267.

<sup>7</sup> 25 Fla. 222; s. c. 5 So. Rep. 707.

legally recorded, and of which he had no notice when he took his own mortgage.

And it has been said that where land held by a purchaser in foreclosure of a junior mortgage was foreclosed under one of two senior mortgages of equal priority, the application of the balance of the proceeds, after satisfaction of the mortgage foreclosed, to the other mortgage, on special execution, was an irregularity of which the purchaser under the junior mortgage could not complain.<sup>1</sup>

In those cases where a mortgage is given to secure several notes, but contains no stipulation as to the order in which the notes should be paid, and there is no agreement as to such order, there can be no priority of rights in favor of different assignees of such notes, but they are entitled to participate ratably in the fund derived from the security.<sup>2</sup> And one who has advanced money to redeem property from an execution and a decree foreclosing a mortgage which has become absolute, and conveyed the title obtained to the mortgagor under an agreement that the property shall remain as security for the whole sum advanced, is entitled to be repaid an excess of moneys advanced over the amount of the two liens as against mortgagees whose rights are inferior thereto, since they would have been entirely cut off and must rely on the conveyance to the mortgagor, and in relying thereon must take it subject to the agreement upon which it was made.<sup>3</sup>

In Louisiana it is held that in executory process to enforce a special mortgage, a plaintiff holding a legal mortgage upon half of the property covered by the special mortgage cannot require the proceeds to be distributed so as also to satisfy the general or legal mortgage.<sup>4</sup>

In Pennsylvania it is held that under the statute<sup>5</sup> the lien given a widow upon lands assigned to one of the heirs

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<sup>1</sup> Stanbrough v. Daniels, 77 Iowa 561; s. c. 42 N. W. Rep. 443.

<sup>2</sup> Penzel v. Brookmire, 51 Ark. 115; s. c. 10 S. W. Rep. 15.

<sup>3</sup> Johnson v. Valido Marble Co., 64 Vt. 337; s. c. 25 Atl. Rep. 441.

<sup>4</sup> Dodds v. Lanaux, 45 La. An. 287; s. c. 12 So. Rep. 345.

<sup>5</sup> Pa. Act, March 29, 1832, 4L.

in partition of her husband's estate, extends only so far as to secure the sums accrued to her, and does not affect the life estate to which she was previously entitled; and arrearages remaining unpaid at her death can be paid only out of the surplus resulting from the sale of the land upon a foreclosure of a mortgage given by such heir to secure her life estate and the interest of the other heirs after her death, and not from the proceeds payable to such heirs.<sup>1</sup>

§ 712. Questions of priority—How determined.—The question of priority of liens is to be determined by the date of registry,<sup>2</sup> judgment or decree.<sup>3</sup> In those cases where there are several notes maturing at different dates secured by mortgage, they should be paid in the order of their maturity, in the absence of any provision requiring payment to be made in a different manner, even though all the notes are due when the sale is made under the power contained in the deed.<sup>4</sup>

It has been said that an insolvent indorser of promissory notes secured by a mortgage which is insufficient to pay them in full, is not entitled to share in the distribution of the proceeds of the mortgage on account of a portion of such notes, which it had transferred as collateral security, and had again become entitled to receive because of the payment of the debt secured.<sup>5</sup> And the debts of a corporation for the salaries of its officers, are not entitled to priority of payment out of the proceeds of mortgaged property of the corporation over the liens of the mortgagees.<sup>6</sup>

§ 717. Rights of prior incumbrancers not parties.—The rights of a senior mortgagee are not affected by the foreclosure of a junior mortgage, where he is not a party to

<sup>1</sup> Hagenman v. Esterly (Pa. C. P.),  
1 Pa. Dist. Rep. 704; s. c. 11 Pa.  
Co. Ct. Rep. 609.

<sup>2</sup> Reusch v. Keenan, 42 La. An.  
419; s. c. 7 So. Rep. 589.

<sup>3</sup> Clark v. Clark, 62 N. H. 267.

<sup>4</sup> *Re* Ferguson's estate (Mo. 1894),  
27 S. W. Rep. 513. AA

<sup>5</sup> New York Fourth Nat. Bank's  
Appeal, 123 Pa. St. 473; s. c. 16  
Atl. Rep. 779; 46 Phila. Leg. Int.  
220; 19 Pitts. L. J. N. S. 295; 23  
W. N. C. 55; 17 Wash. L. Rep. 392.

<sup>6</sup> Stafford v. Blum, 7 Tex. Civ.  
App. 283; s. c. 27 S. W. Rep. 12.

**the action.** And a senior mortgage duly recorded being notice to a purchaser at a sale on a foreclosure of a junior mortgage, unless he is misled by the conduct of the mortgagee or his agent, which induces him to conclude that the property is sold free from the prior lien, he will take the property subject to such prior mortgage. If at the time of the sale such mortgage has been foreclosed, the mortgagee may place his execution in the hands of the officers making the sale, and cause the title to be sold unincumbered, and claim the proceedings arising therefrom, according to the date of his lien.<sup>1</sup>

A prior mortgagee is not entitled to share in the surplus arising upon a sale under a foreclosure of a second mortgage, or other junior liens; such surplus is to be applied in discharge of the junior liens in the order of their priority,<sup>2</sup> or to the mortgagor or owner of the equity of redemption.<sup>3</sup>

**§ 719. Equitable priorities between subsequent mortgagees.**—In those cases where there are two or more liens which junior to the one foreclosed, the surplus arising from the sale is to be applied to the discharge of such liens in the order of their priority.<sup>4</sup>

The supreme court of the United States, in the case of *the Farmers' Loan and Trust Company v. Newman*,<sup>5</sup> say that where the receiver of a railroad company agreed to pay a lien on part of the railroad out of the money realized from such part upon foreclosure sale, and the lienor surrendered his lien, and the receiver bid in the property on such sale as an entirety, the right of the lienor to be paid out of the aggregate proceeds of the sale is not defeated by the fact that the mortgage bondholders made payment in mortgage bonds, as allowed by the decree of sale; and if the lien is not discharged in money the property will again be

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<sup>1</sup> *Roberts v. Hinson*, 77 Ga. 589; s. c. 2 S. E. Rep. 752.

<sup>2</sup> See: *Ante*, § 696 *et seq.*

<sup>4</sup> See: *Ante*, §§ 711, 712.

<sup>3</sup> *Scheppleman v. Feurth*, 87 Mo. 351; s. c. 3 West. Rep. 239. See: *Ante*, § 717.

<sup>5</sup> 127 U. S. 649; bk. 32 L. ed. 303; 8 Sup. Ct. Rep. 1364.



sold as an entirety, or so much thereof as is necessary to raise the amount of the lien.

§ 733. **Married Woman's equitable right to surplus.**—The equitable rights of a married woman in and to the surplus arising on a mortgage foreclosure will be jealously guarded by the courts; and in those states where the right of homestead prevails, a married woman's right to demand a portion of such surplus in lieu thereof will be protected. Thus the supreme court of Ohio, in the case of *Niehaus v. Faul*,<sup>1</sup> say that in a case where two lots are separately mortgaged, by the sale and confirmation of the first, where the owner had a right of homestead, her ownership was divested; and if the surplus arising from its sale on foreclosure was insufficient, she was entitled, under the statute,<sup>2</sup> to demand an allowance in lieu of her homestead exemption out of the surplus arising from the sale of other lands. The right to demand such an allowance out of the proceeds of land sold under foreclosure, in lieu of a homestead, is to be determined by the state of facts at the time the surplus arising from the sale was finally disposed of by the court.\*

§ 734. **Dower in surplus moneys.**—The supreme court of the District of Columbia, *In re Thompson*,<sup>4</sup> say that where a deed of trust in which the grantor's wife joined, releasing her dower, directed the trustees to sell upon default and pay the surplus, after paying the debt, to the grantor, his executors, administrators, or assigns, and the property was sold under the trust after the grantor's death, the widow is not entitled to any of the surplus, which is distributable to the heirs.

§ 735. **Inchoate right of dower.**—The wife of the mortgagor, or owner of the equity of redemption, has an inchoate right of dower which attaches to the surplus moneys realized upon a sale of the husband's lands upon a foreclosure decree, and her interest in the fund will be pro-

<sup>1</sup> 43 Ohio St. 63; s. c. 1 N. E. Rep. 87; 1 West. Rep. 100.

<sup>2</sup> Ohio Rev. Stat., § 5441.

<sup>3</sup> *Niehaus v. Faul*, 43 Ohio St. 63; Cent. Rep. 452.

<sup>4</sup> 6 Mackey (D.C.) 536; s. c. 13

tected against her deceased husband's creditors;<sup>1</sup> but it is thought that her rights cannot be litigated in an action to recover the fund, in a case where she is not a party.<sup>2</sup> Some of the courts have gone so far as to protect the wife's inchoate right of dower during her coverture, in the surplus arising from sale under a mortgage,<sup>3</sup> but this doctrine is earnestly combatted by some of the courts.

In the case of *Kauffman, v. Ellis*,<sup>4</sup> the question of a wife's right to inchoate dower in surplus was fully discussed by the supreme court of Illinois. In that case it was contended on behalf of the appellant that, by joining her husband in the execution of the deed of trust under which the property was sold and the surplus arose, she only released her inchoate right of dower to the mortgagee, and, as the attaching creditors did not claim under the mortgagee, she was entitled to be protected in her inchoate dower rights as against them. It was claimed by the appellees that where a wife unites with her husband in the execution of a mortgage or deed of trust, releasing her inchoate dower, and a sale occurs under such mortgage or deed of trust during the lifetime of the husband, the surplus money arising from such sale becomes personal property, payable to the husband, and the wife has no interest whatever therein. In discussing the question the court say:

"The question presented is not entirely free from difficulty; it is one upon which the authorities are not entirely harmonious. When there has been marriage, seisin and the death of the husband, the right of the dower is complete and may then be enforced; but where there has been marriage and seisin, and death of the husband has not occurred, an inchoate right of dower only exists. In this case it is clear that appellant had an inchoate right of dower in the equity of redemption of the premises, of which she could not have been deprived by any creditor of her

<sup>1</sup> *Butler v. Smith*, 20 Org. 126; s. c. Ill. 212; s. c. 3 N. E. Rep. 749; 25 Pac. Rep. 381. West. Rep. 41, 45.

<sup>2</sup> *Id.*

<sup>4</sup> 115 Ill. 212; s. c. 3 N. E. Rep.

<sup>3</sup> See: *Kauffman v. Peacock*, 115 749; 2 West. Rep. 41, 45.

husband if she had paid off the deed of trust; but this she failed to do, and suffered the land to be sold under the deed of trust and converted into money. Under such circumstances has she any dower rights in the surplus money arising from the sale?

“Mr. Jones, in his work on mortgages,<sup>1</sup> in discussing the question, says; ‘In some cases the courts have gone so far as to protect the inchoate interest of the wife during coverture in the surplus arising from a mortgage sale, by permitting her, as against judgment creditors, to have one-third of the residue invested for her benefit, and kept invested during the joint lives of herself and her husband, and the interest paid to her during her own life in case of her surviving her husband. But it would seem doubtful whether a court of equity, in the exercise of its ordinary jurisdiction, has the power to enforce such a doctrine, and the weight of authority is against allowing the wife any such right against her husband’s creditors.’

“In *Cook v. Dillon*,<sup>2</sup> in a case somewhat analogous to the case of *Hoffman v. Ellis*, the court held that surplus money in the hands of a trustee after satisfying the deed of trust, was the personal property of the mortgagor, liable to be seized in payment of his debts. The same doctrine was announced in *Dean v. Phillips*,<sup>3</sup> and in *Newhall v. Lynn Savings Bank*.<sup>4</sup>

“The court in the course of the opinion in *Kauffman v. Ellis*, say; ‘The appellant has cited *Denton v. Nanny*,<sup>5</sup> as a leading authority sustaining her view of the case. The decision sustains the position of the appellant, and the doctrine announced was approved in *Vartie v. Underwood*.<sup>6</sup> The appellant also relies upon *Vreeland v. Jacobus*,<sup>7</sup> *Wheeler v. Kirtland*,<sup>8</sup> *DeWolf v. Murphy*,<sup>9</sup> and *Unger v. Leiter*.<sup>10</sup> We

<sup>1</sup> 2 Jones Mortg. (2d ed.) § 1694.

<sup>2</sup> 9 Iowa, 412; s. c. 74 Am. Dec.

354.

<sup>3</sup> 17 Ind. 409.

<sup>4</sup> 101 Mass., 428, 432; s. c. 3 Am. Rep. 387.

<sup>5</sup> 8 Barb. (N. Y.) 618.

<sup>6</sup> 18 Barb. (N. Y.) 564.

<sup>7</sup> 19 N. J. Eq. (4 C. E. Gr.), 231.

<sup>8</sup> 27 N. J. Eq. (12 C. E. Gr.), 534.

<sup>9</sup> 11 R. I. 630.

<sup>10</sup> 32 Ohio St. 210.

are not inclined to follow the rule laid down in the cases found in Barbour's Reports. The court in which the cases were decided was one of learning and ability, but it was not a court of last resort. The other cases cited and relied upon, seem to sustain appellant's position; but we do not think they are in harmony with the current of authority on the subject, Cooley says:<sup>1</sup> 'The inchoate right of dower does not become property or anything more than a mere expectancy at any time before it is consummated by the husband's death. In neither curtesy nor dower does a marriage alone give a vested right; it gives only a capacity to acquire a right. Here, the husband of appellant was living, and whether the inchoate right of dower would ever become more than a mere expectancy would depend upon the fact, which might never occur, that she would survive him, and we think it would be against sound public policy to tie up a fund in the hands of trustees to abide such an uncertain contingency as that relied upon by complainant in her bill. Again: The complainant executed the deed of trust and relinquished all her dower rights, and contracted that the property might be sold and converted into money; it is true, if she had paid off the mortgage, in the event that she survived her husband, she would be entitled to dower in the property; but the effect of her deed was that the real property in which she might be entitled to dower, might be converted into personal property, and, when thus converted, her inchoate rights would terminate.

"In our judgment, the surplus money arising from the sale in the hands of the trustees was personal assets which belonged to complainant's husband, upon which she had no claim whatever, and, as such, it was liable to be reached by the creditors of August Kauffman in like manner as personal property which he had acquired from any other source. Land articulated to be sold and turned into money

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<sup>1</sup> Const. Lim. (10th ed.) 442.

is reputed money.<sup>1</sup> By executing the mortgage, and permitting the lands to be sold, appellant consented that the real estate should lose its character, as such, and assume the character of personal property; and when it assumed this new character, it would be controlled and governed by the laws in relation to personal and not real property. In the Indiana case, *Dean v. Phillips*,<sup>2</sup> it is said: We do not perceive how Bennett's wife had any interest in the residue of the money after paying the mortgage debt. She executed the mortgage with her husband; otherwise, had she survived him, she might have been entitled to one-third of the land. But the premises have been sold upon the mortgage to which she was a party; her right to or contingent interest in the land has gone. The excess of the money arising from the sale clearly all belonged to Bennett and not to his wife; hence, it might properly be applied to the payment of his debts. In *Newhall v. Lynn Savings Bank*,<sup>3</sup> the court held that the wife of the owner of the estate subject to a mortgage, valid against her, has no right as against her husband or his assignee in bankruptcy in the proceeds of sale of the estate made by the mortgagee for breach of condition, and under power in the mortgage deed."

§ 737. Homestead right in surplus.—We have already seen that a married woman's equitable right in the surplus arising upon mortgage foreclosure will be carefully guarded and protected by the court, and that she is entitled to demand an allowance out of the surplus arising on a mortgage foreclosure sale from any lands of her husband in lieu of her homestead exemption.<sup>4</sup> The law does not treat the husband so liberally; but where he is entitled to a homestead under the statute, and that homestead is sold on mortgage foreclosure, he is entitled to the surplus as against all creditors. Thus, the Illinois court of appeals, in the case of *Trogden v. Safford*,<sup>5</sup> say that where the mortgagee purchases the homestead of the mortgagor at a sale under

<sup>1</sup> 2 Story Eq., § 1212.

<sup>2</sup> 17 Ind. 409

<sup>3</sup> 101 Mass. 432; 3 Am. Rep. 387.

<sup>4</sup> See: *Ante*, §§ 733, 734, 735.

<sup>5</sup> See: *Ante*, § 733.

<sup>6</sup> 21 Ill. App. 240.



foreclosure, he cannot apply the surplus on other claims against the mortgagor, as to which the right of homestead has not been waived.

§ 742. **Rights of cestuis que trust in surplus.**—Beneficiaries are entitled to share in the surplus arising on mortgage foreclosure. Thus, it has recently been said the beneficiaries under a trust deed or mortgage on lands by one not holding the title may affirm the sale by the mortgagee and recover the proceeds in his hands; in such case, however, the mortgagee is entitled to retain the expenses of the sale and any payments he may have been called upon to make for the purposes of the trust.<sup>1</sup>

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<sup>1</sup> *Re Champion* (C. A.), 1893, 1 Ch. 101.

## CHAPTER XXXIII.

### PROCEEDINGS ON SURPLUS MONEYS.

PRACTICE—DISTRIBUTION BY SURROGATES AND SUPREME COURTS—APPLICATION FOR SURPLUS—APPOINTING REFEREE—HIS POWERS AND DUTIES—WHAT MAY BE LITIGATED—TESTIMONY SIGNED—REFEREE'S REPORT—CONFIRMATION—ORDER FOR DISTRIBUTION—APPEAL.

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| <p>§ 746. Foreclosure by advertisement<br/>—Junior mortgagee an<br/>“ assignee.”</p> <p>748. Action to enforce claim to<br/>surplus</p> <p>749. Recovering surplus wrongfully<br/>paid.</p> <p>750. Application for surplus mon-<br/>eys.</p> | <p>§ 751. Who entitled to notice.</p> <p>754. Order of Reference—What<br/>petition must show.</p> <p>755. Presenting proof of claim.</p> <p>758. What claims may be litigated.</p> <p>765. Confirmation of referee's re-<br/>port.</p> |
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§ 746. Foreclosure by advertisement—Junior mortgagee an “ assignee.”—Under the Minnesota statute, on the foreclosure by advertisement of a mortgage on real estate, a junior mortgagee is an “ assign ” of the mortgagor, so as to be entitled, on demand, to have his mortgage paid out of the surplus, so far as it will suffice.<sup>1</sup>

§ 748. Action to enforce claim to surplus.—The supreme court of Massachusetts, in the case of *Johnson v. Cobleigh*,<sup>2</sup> say that on a sale, under a power in a mortgage, of lands in which another has purchased the equity of redemption on a sale under execution against the mortgagor, the debtor is entitled to so much of the surplus as exceeds the amount he would have been obliged to pay to redeem the equity of redemption ; and if no one else is interested in the fund he is entitled to recover the surplus in a legal action for money received by the creditor to his use.

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<sup>1</sup> *Fuller v. Langum*, 37 Minn. 74;  
s. c. 33 N. W. Rep. 132

<sup>2</sup> 152 Mass. 17; s. c. 25 N. E. Rep.  
73 (1449)

§ 749. **Recovering surplus wrongfully paid.**—When surplus moneys have been paid to a person not entitled thereto under an order irregularly obtained, the court has authority, by summary proceedings, to compel restitution of the money. But the supreme court of Minnesota, in the case of *Fuller v. Langum*,<sup>1</sup> say that an officer making sale on foreclosure of a senior mortgage, and receiving the surplus knowing of the junior mortgagee's right, who immediately pays the surplus to the mortgagor, becomes liable to the junior mortgagee. And it is said that agreements and assurances made by the trustee in a trust deed that the surplus may be applied upon debts of the mortgagor when the deed expressly provides that it shall be paid to the mortgagor, are not ratified by the latter's bringing suit against the purchaser for the surplus.<sup>2</sup>

§ 750. **Application for surplus moneys.**—In those cases where the judgment and decree of foreclosure of a mortgage and ordering the sale of the mortgaged property, omits a provision directing what disposition shall be made of any surplus remaining after the costs and liens are paid from the proceeds of the sale, will not work a reversal of the judgment, but the court may, upon application after judgment, direct the payment of the surplus to any party entitled thereto.<sup>3</sup> Where a junior lien holder has laid specific claim to any rents that a receiver appointed in foreclosure proceedings might collect, before the lands are leased pending the proceedings, the court should direct the surplus of the rent remaining after satisfying the mortgage lien to be held by the receiver subject to the further order of the court, until after the determination of the suit of such lien-holder to establish his lien.<sup>4</sup> In case of the death of the mortgagor, and no administration upon his estate for seventeen months after such death, on the sale of the mortgaged premises his heirs will be given the surplus.<sup>5</sup>

<sup>1</sup> 37 Minn. 74; s. c. 33 N. W. Rep. 122.

<sup>4</sup> *Weis v. Neel* (Ark.), 14 S. W. 1097.

<sup>2</sup> *Gair v. Tuttle*, 49 Fed. Rep. 198.

<sup>5</sup> *Snow v. Warwick Sav. Inst.*, 17

<sup>3</sup> *Brier v. Brinkman*, 44 Kan. 570; s. c. 24 Pac. Rep. 1108.

R. I. 66; s. c. 20 Atl. Rep. 94.

The Missouri court of appeals, in the case of *Perkins v. Heiser*,<sup>1</sup> say that a party purchasing property under a deed of trust has no right to have any portion of the surplus arising from that sale applied to the payment of a prior mechanics' lien judgment.

§ 751. Who entitled to notice.—All persons interested in the equity of redemption, as well as all persons who have appeared in the case and filed a notice of claim, are entitled to notice in proceedings before a commissioner or referee or the court to establish a right to a part of the surplus arising from a foreclosure sale.<sup>2</sup>

§ 754. Order of reference.—What petition must show.—The supreme court of Michigan, in the case of *Allen v. Wayne Circuit Judges*,<sup>3</sup> say that where a surplus arises on a mortgage foreclosure, to which a claim is made, the petition for the reference required in such case is fatally defective if it does not show how the parties cited are related to the mortgaged lands.

§ 755. Presenting proof of claim.—In all proceedings on a reference to ascertain claims and liens upon surplus moneys in a foreclosure action, the general rules of evidence governing courts on the trial of an action apply, and they cannot be changed by an order of the court appointing the referee.<sup>4</sup>

§ 758. What claims may be litigated.—The supreme court of New York, in the case of *Wolfers v. Duffield*,<sup>5</sup> say that a stay of proceedings for the distribution of surplus money on mortgage foreclosure will not be ordered until the trial of an action brought sixteen years before to set aside a deed of the premises as fraudulent, since in the surplus proceedings all questions as to the fraudulent character

<sup>1</sup> 34 Mo. App. 465.

<sup>2</sup> *Allen v. Wayne Circuit Judges*, 57 Mich. 198; s. c. 23 N. W. Rep. 728.

<sup>3</sup> 57 Mich. 198; s. c. 23 N. W. Rep. 728.

<sup>4</sup> *Mutual L. Ins. Co. v. Anthony*, 50 Hun (N. Y.) 101; s. c. 19 N. Y. S. R. 38.

<sup>5</sup> 25 N. Y. Supp. 374; s. c. 55 N. Y. S. R. 485.

of the deed can be tested ; and if it is an action to set aside the deed as fraudulent, no trial by jury can be had as of right ; and that if it is to recover damages for fraud and deceit, recovery in the action will not establish a lien upon the surplus moneys.

§ 765. Confirmation of referee's report.—The court has power to confirm, set aside, or refer back a referee's report in a mortgage foreclosure. It has been held that where an order is entered directing that a master's report of a foreclosure sale be confirmed unless objections are filed, on the filing of such objections for the sole purpose of deciding who is entitled to the surplus, an order disposing of such surplus is equivalent to a confirmation of the sale, as against the party objecting.<sup>1</sup>

It is said in the case of *Cutting v. Tavors, Orlando and Atlantic Railroad Company*,<sup>2</sup> that a decree of distribution of the proceeds of a railroad mortgage is erroneous in rejecting a credit to the purchaser which was allowed by the decree of confirmation settling his rights and obligations.

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<sup>1</sup> *Lambert v. Livingston*, 131 Ill. 161; s. c. 23 N. E. Rep. 352.      <sup>2</sup> 61 Fed. Rep. 150.



## CHAPTER XXXIV.

### STATUTORY FORECLOSURE, OR FORECLOSURE BY ADVERTISEMENT.

POWER OF SALE—NOTICE OF SALE—PUBLISHING, POSTING, SERVING—CONTENTS  
OF NOTICE—CONDUCT OF SALE—SETTING ASIDE—ENJOINING—  
EFFECT OF SALE—AFFIDAVITS OF PROCEEDINGS—  
RECORDING SAME—OPERATE AS DEED TO  
PASS TITLE—U. S. LOAN COMMIS-  
SIONERS MORTGAGES.

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| <p>§ 763. General nature.</p> <p>770. What mortgages may be foreclosed by advertisement.</p> <p>772. Who may foreclose by advertisement.</p> <p>773. Notice of sale—Publication.</p> <p>774. What is a valid publication of the notice.</p> <p>776. Delivering notice of sale to county clerk—His failure to enter and index—Effects on sale.</p> <p>777. Personal service of notice—Who entitled to.</p> <p>778. Service on personal representative.</p> <p>785. Description of mortgaged premises in notice.</p> | <p>§ 783. Stating amount due in notice.</p> <p>793. Postponement of sale.</p> <p>797. Terms of sale.</p> <p>798. Mortgagee may become purchaser.</p> <p>800. Grounds for setting sale aside.</p> <p>806. Publishing notice of loan commissioner's sale.</p> <p>812. Sale firm and binding on all parties.</p> <p>814. Purchaser's title — What passes by sale.</p> <p>815. Defective foreclosure.</p> <p>820. Recording affidavits.</p> <p>824. A deed not necessary.</p> <p>824a. Deed to purchaser.</p> |
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§ 768. General nature.—Statutory foreclosure, or foreclosure by advertisement, is exclusively a creature of legislative enactment, and the right exists only in those states where specifically provided for by statute; a power contained in the mortgage seeking to confer such right is void.<sup>1</sup> Where the statute confers the right to foreclosure by advertisement, no notice of intention to foreclose a mortgage con-

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<sup>1</sup> Thus, in Nebraska, a sale under a power of sale in a mortgage is void; the mortgagee's remedy is limited to proceedings in court. *Wheeler v. Sexton*, 34 Fed. Rep. 154. (1453)

taining a power of sale is necessary, unless there was an express stipulation therefor.<sup>1</sup> And in those cases where a mortgage expressly provides that the mortgagee may sell at private sale, and does not provide for any notice to be given, a sale without notice after the debt is due is valid.<sup>2</sup> Where a sale under a power in a mortgage is regular, it cuts off the equity of redemption and reduces it to a mere statutory right, although no conveyance is executed to the purchaser.<sup>3</sup> And where, at such a sale, there is no writing signed to take the contract out of the Statute of Frauds, only the mortgagee and the purchaser can take advantage of the omission.<sup>4</sup>

The supreme court of Rhode Island, in the case of Bull's Petition,<sup>5</sup> say that a power reserved to a grantor in a mortgage, to release any restrictions in his deeds against erecting any edifice for obstruction of light near the buildings, the mortgage also containing a power of sale authorizing the mortgagee to sell the premises absolutely and in fee simple, is extinguished by a sale for breach of condition.

§ 770. What mortgages may be foreclosed by advertisement.—The supreme court of South Dakota, in the case of Grant County v. Colonial and United States Mortgage Company,<sup>6</sup> say that a mortgage of real estate is complete without a power of sale, and it is only a mortgage having an express power of sale that may be foreclosed by advertisement. And the supreme court of Michigan, in the case of Olcott v. Crittenden,<sup>7</sup> say that statutory foreclosure is not adapted to cases where there are conflicting equities which can only be protected in a court of chancery. And it has been said by the supreme court of Minnesota, that after the execution, delivery and record of a quitclaim deed the legal effect of which is to release and discharge a mort-

<sup>1</sup> Carver v. Brady, 410 N. C. 219; s. c. 10 S. E. Rep. 565.

<sup>2</sup> Rose v. Page, 82 Mich. 105; s. c. 46 N. W. Rep. 227.

<sup>3</sup> Newburn v. Bass, 82 Ala. 622; s. c. 2 So. Rep. 520.

<sup>4</sup> *Id.*

<sup>5</sup> 15 R. I. 534; s. c. 10 Atl. Rep. 484; 4 N. Eng. Rep. 748.

<sup>6</sup> 3 S. D. 390; s. c. 53 N. W. Rep. 746.

<sup>7</sup> 68 Mich. 230; s. c. 36 N. W. Rep. 41; 12 West. Rep. 566.

gage of record, the mortgagee cannot foreclose the mortgage by advertisement, and that consequently such foreclosure proceedings are void and of no effect.<sup>1</sup>

It has been held that one of several mortgages made by an incompetent person, which in a suit for their cancellation has been allowed by the court to stand as security for benefits actually received by the mortgagor, and which by the decree has been changed in its terms as to rate of interest and time of payment, and foreclosure thereof enjoined until the other mortgages are canceled and the notes surrendered,—cannot be foreclosed by advertisement, but foreclosure must be by proceeding in chancery, in which compliance with the terms of the decree must be alleged and proved.<sup>2</sup> And it is thought that foreclosures on reversions and equities may come within a rule of necessity and practicability, upholding the only possession of which the mortgaged estate is reasonably capable.<sup>3</sup>

§ 772. Who may foreclose by advertisement.—A deputy sheriff may sell land on foreclosure of mortgage by advertisement.<sup>4</sup> Under the statutes of Michigan,<sup>5</sup> providing that a bank may hold such real estate as it shall purchase at sale under judgments, “decrees or mortgage foreclosures,” under securities held by it, a bank may foreclose by advertisement a mortgage containing a power of sale.<sup>6</sup> The foreclosure of a mortgage by advertisement in the name of the mortgagee is void where the mortgagee is at the time deceased.<sup>7</sup> But a sale under a power in a trust deed is not void because the trustee was the real owner of the note secured thereby, at the time the deed was executed.<sup>8</sup>

<sup>1</sup> *Benson v. Markoe*, 41 Minn. 112; s. c. 42 N. W. Rep. 787.

<sup>2</sup> *Strong v. Tomlinson*, 88 Mich. 112; s. c. 50 N. W. Rep. 106.

<sup>3</sup> *Bartlett v. Sanborn*, 64 N. H. 70; s. c. 6 Atl. Rep. 486; 3 Eng. Rep. 168. See: *Palmer v. Fowley*, 71 Mass. (5 Gray) 545; *Penniman v. Hollis*, 13 Mass. 429; *Colby v. Poor*, 15 N. H. 198.

<sup>4</sup> *Heinmiller v. Hatheway*, 60 Mich. 391; s. c. 27 N. W. Rep. 558.

<sup>5</sup> 3 How. Mich. Annotated Stat. 3208b.

<sup>6</sup> *Gage v. Sanborn* (Mich. 1895) 64 N. W. Rep. 32.

<sup>7</sup> *Welsh v. Cooley*, 44 Minn. 446; s. c. 46 N. W. Rep. 908.

<sup>8</sup> *Cassady v. Wallace*, 102 Mo. 575; s. c. 15 S. W. Rep. 138.

The supreme court of North Dakota, say the record must show complete title to the mortgage in a party seeking to foreclose a mortgage by advertisement, claiming such right as assignee; otherwise such foreclosure will be a nullity.<sup>1</sup> And in those cases where the mortgagee is dead a foreclosure by advertisement upon a notice of sale purporting to be given by authority of the mortgagee, is void; nor can it be cured by proof that in fact the notice was given by authority of another person.<sup>2</sup>

§ 773. **Notice of sale—Publication.**—The requirements as to the contents and publication of the notice in foreclosure by advertisement are purely statutory. Substantial compliances with the statutory requirement will be sufficient.<sup>3</sup> But it is thought that it is not necessary that the sheriff at the time of a foreclosure sale by advertisement should have before him an affidavit of the notice of sale.<sup>4</sup> And in the absence of a requirement to that effect either in the statute or the instrument the donee is under no obligation, so long as he acts within terms of the power, to give any notice, other than the general notice prescribed in the power, of what he intends to do.<sup>5</sup>

It is thought that a foreclosure sale by advertisement is not invalidated by failure of the notice of sale to give the book and page of the register of the assignment of the mortgage, where it is not required by statute.<sup>6</sup> Neither

<sup>1</sup> *Morris v. McKnight*, 1 N. D. 266; s. c. 47 N. W. Rep. 375.

<sup>2</sup> *Bausman v. Kelley*, 38 Minn. 197; s. c. 36 N. W. Rep. 333; 8 Am. St. Rep. 661.

<sup>3</sup> *Maryland Act*, 1889, c. 98, commonly known as the Annexation Act, does not affect a power of sale contained in a mortgage further than to require notice to be given as provided in the Baltimore City Local Code, art. 4, § 792; *Chilton v. Brooks*, 71 Md. 445; 18 Atl. Rep. 863; 28 Am. & Eng. Corp. Cas. 32.

*West Virginia Code*, 1868, c.

166, § 2, a sale under is not invalid because the notice of sale did not conform to that statute, where its publication was completed before the statute took effect. *Fowler v. Lewis*, 36 W. Va. 112; s. c. 14 S. E. Rep. 447.

<sup>4</sup> *McCammon v. Detroit L. & N. R. Co.*, 103 Mich. 104; s. c. 61 N. W. Rep. 273.

<sup>5</sup> *Reynolds v. Hennessey*, 15 R. I. 513; s. c. 8 Atl. Rep. 715; 4 N. Eng. Rep. 598.

<sup>6</sup> *McCammon v. Detroit L. & N. R. Co.*, 103 Mich. 104; s. c. 61 N. W. Rep. 273.

will the foreclosure be invalidated by the fact that the notice fails to name the mortgagor or mortgagee or any person connected with the mortgage, if the place of record is correctly stated.<sup>1</sup>

A sale by advertisement under a power in a mortgage or trust deed is not invalid because the notice fails to state the actual amount due;<sup>2</sup> and in a statutory foreclosure, under the Michigan<sup>3</sup> or New York<sup>4</sup> statutes, is not vitiated by an over-statement in the notice of sale, without fraudulent intent, of the amount due on the mortgage,<sup>5</sup>—as by including a payment not due at its date; if it becomes due before the first publication, the mortgagee does not act in bad faith, and no one is misled thereby.<sup>6</sup>

Where a mortgage contains a provision in a power of sale requiring that twenty days' notice of sale should be given in some newspaper, this is construed to mean a continuous notice for twenty days; and a notice in a daily newspaper on seven days only, at intervals during twenty days preceding sale is not sufficient.<sup>7</sup> But it is thought that if the mortgagee in good faith selects a weekly paper, the insertion of the notice in each issue of the paper for the designated period will fulfill all the requirement.<sup>8</sup>

It is said by the supreme court of South Carolina that a

<sup>1</sup> Colgan v. McNamara, 16 R. I. 554; s. c. 18 Atl. Rep. 157.

<sup>2</sup> See: Sawyer v. Bradshaw, 125 Ill. 440; s. c. 17 N. E. Rep. 812; 15 West. Rep. 147; Cook v. Foster, 96 Mich. 610; s. c. 55 N. W. Rep. 1019; Lewis v. Duane, 69 Hun (N. Y.) 28; s. c. 23 N. Y. Supp. 433; 52 N. Y. S. R. 818.

In Illinois, on a bill to set aside a trust deed and sale thereunder as fraudulent against creditors, complainant cannot avail himself of the fact that a notice of sale did not state the actual amount due, as required by statute. Sawyer v. Bradshaw, 125 Ill. 440; s. c. 17 N. E. Rep. 812; 15 West. Rep. 147. BB

<sup>3</sup> Cook v. Foster, 69 Mich. 610; s. c. 55 N. W. Rep. 1019.

<sup>4</sup> Lewis v. Duane, 69 Hun (N. Y.) 28; s. c. 23 N. Y. Supp. 433; 52 N. Y. S. R. 818.

<sup>5</sup> Lewis v. Duane, 69 Hun (N. Y.) 28; s. c. 52 N. Y. S. R. 818; 23 N. Y. Supp. 433.

<sup>6</sup> Cook v. Foster, 96 Mich. 610; s. c. 55 N. W. Rep. 1019.

<sup>7</sup> Washington v. Bassett, 15 R. I. 563; s. c. 10 Atl. Rep. 625; 4 N. Eng. Rep. 750.

<sup>8</sup> Washington v. Bassett, 15 R. I. 563; s. c. 10 Atl. Rep. 625; 4 N. Eng. Rep. 750.



failure of a master to advertise a sale under foreclosure for the full statutory period, is a mere irregularity which will not avoid the sale under the statute of that state<sup>1</sup> regulating the time of advertisement, and putting such sales on the same footing as those under execution.<sup>2</sup>

§ 774. What is a valid publication of the notice.—The publication of the notice of sale in foreclosure by advertisement must strictly comply with the requirements of the statute and the mortgage. Thus it has been said that an attempt to foreclose a mortgage by advertisement under the Maine statute<sup>3</sup> is fatally defective unless the date of the newspaper in which the notice was last published is recorded.<sup>4</sup> But in those cases where the record of a mortgage incorrectly states the place where publication is to be made, this will not avoid the notice and invalidate the sale where the notice is duly published as required in the mortgage.<sup>5</sup>

The supreme judicial court of Massachusetts, in the case of *Steveson v. Hano*,<sup>6</sup> say that a sale under a power in a mortgage, requiring an advertisement to be made in "one newspaper published in Boston," is properly advertised in a paper published in Brighton, which is a part of Boston, although having a circulation of only about 500 copies, where the property is an unoccupied lot of moderate value, and the newspaper is the one nearest to the land, and is read among the neighbors. And the supreme court of Rhode Island, in the case of *Colgan v. McNamara*,<sup>7</sup> hold that an advertisement of a sale under a power contained in a mortgage which required publication of notice in some newspaper in the county of Providence, in said state, is not insufficient because it appeared in a newspaper published at a place in the county other than one of two certain cities in

<sup>1</sup> S. C. Gen. Stat. § 2424.

<sup>2</sup> *Alexander v. Messervey*, 35 S. C. 409; s. c. 14 S. E. Rep. 854.

<sup>3</sup> Me. Rev. Stat., c. 90, § 5.

<sup>4</sup> *Hollis v. Hollis*, 84 Me. 96; s. c. 24 Atl. Rep. 581.

<sup>5</sup> *Colgan v. McNamara*, 16 R. I. 554; s. c. 18 Atl. Rep. 157.

<sup>6</sup> 148 Mass. 616; s. c. 20 N. E. Rep. 200.

<sup>7</sup> 16 R. I. 554; s. c. 18 Atl. Rep. 157.

which the record of the mortgage erroneously required notice to be published.

§ 776. **Delivering notice of sale to county clerk—His failure to enter and index—Effect on sale.**—The supreme court of New York, in the recent case of *Van Vleck v. Enos*,<sup>1</sup> say that the omission of the clerk to enter in the book in which notices of foreclosure and sale were affixed, at the bottom of the notice, the time of receiving and affixing the same, and to index the notices to the name of the mortgagor, as required by the New York statutes with reference to foreclosure by advertisement as they stood in 1869, is fatal to the validity of the foreclosure.

§ 777. **Personal service of notice—Who entitled to.**—Where a joiner mortgagee is in possession, a foreclosure by advertisement of a prior mortgage without notice to him is void;<sup>2</sup> but no subsequent waiver of the failure to serve notice by such occupant of the premises who is not the owner or authorized to bind him in the premises, will validate the foreclosure of a prior mortgage by advertisement, as respects the owner. And the supreme court of Minnesota say that acts of ownership without actual occupancy are insufficient to put in operation the provision of the statute of that state,<sup>3</sup> requiring that upon foreclosure of a mortgage by advertisement, a copy of the published notice shall be served, in like manner as a summons, on the person in possession of the mortgaged premises, if the same are actually occupied.<sup>4</sup>

The presumption of the regularity of the proceedings in a foreclosure by advertisement, which arises from the certificate of sale, is rebutted by proof of failure to serve notice upon the occupant of the premises, where he is not the owner; and the certificate is not presumptive evidence in that case of the actual service of notice upon the owner.<sup>5</sup>

<sup>1</sup> 183 Hun (N. Y.) 348; s. c. 34 N. Y. Supp. 754.

<sup>4</sup> *Moulton v. Sidle*, 52 Fed. Rep. 616.

<sup>2</sup> *Casey v. McIntyre*, 45 Minn. 526; s. c. 48 N. W. Rep. 402.

<sup>5</sup> *Casey v. McIntyre*, 45 Minn. 526; s. c. 48 N. W. Rep. 402.

<sup>3</sup> Minn. Gen. Stat., 1878, c. 81, tit. 1, p. 842.

§ 778. **Service on personal representative.**—Where the statute requires the notice of foreclosure by advertisement to be served upon the personal representatives of the deceased mortgagor,<sup>1</sup> in the absence of any personal representative of a deceased mortgagor of reality, a foreclosure by advertisement is good, if conducted in the mode prescribed by statute, without service of the notice required to be served on the mortgagor's personal representative.<sup>2</sup>

§ 785. **Description of mortgaged premises in notice.**—The description of the mortgaged premises in the notice of sale in foreclosure advertisement, should be the same as that in the mortgage; but it is thought that a slight variance in the description of the quantity of mortgaged premises between the mortgage and the notice is not fatal to the validity of the foreclosure, where there is no actual prejudice and it is not uncertain, obscure, or misleading as to what the bidder will acquire by his purchase.<sup>3</sup>

§ 788. **Stating amount due in notice.**—The notice of sale in foreclosure by advertisement should state the exact amount due and for which the premises are to be sold, although the sale will not be invalidated by a failure to state the exact amount due, where there is no fraudulent intent and no substantial injury results from such failure.<sup>4</sup> And where the amount alleged to be due is greater than the amount allowed by the terms of the mortgage, in the absence of fraud or any other irregularity, the mortgagor will be required to do equity by paying the amount actually due, or submit to a decree for the resale of the premises;<sup>5</sup> for the mere fact that a larger amount is claimed in a notice of a sale of lands on foreclosure by advertisement than is actually due does not, where no actual injury or fraudulent purpose is shown, render the sale, and the deed executed in

<sup>1</sup> As N. Y. Laws, 1844, c. 346.

<sup>2</sup> *Schoch v. Birdsall*, 48 Minn. 441;

<sup>3</sup> *Stanley v. Freckleton*, 65 Hun 51 N. W. Rep. 382.

(N. Y.) 138; s. c. 19 N. Y. Supp. <sup>4</sup> See: *Ante*, § 473.

913; 47 N. Y. S. R. 383; *Bond v.* <sup>5</sup> *Huyck v. Graham*, 82 Mich. 353;

*Bond*, 51 Hun (N. Y.) 507; s. c. 21 s. c. 46 N. W. Rep. 781.

N. Y. S. R. 682.

pursuance thereof, void.<sup>1</sup> But in those cases where the mortgagee becomes the purchaser at the sale of the property for such amount, he is liable to the mortgagor or his assigns for the excess.<sup>2</sup>

The supreme court of Michigan have said, in the case of *Emmons v. Van Zee*,<sup>3</sup> that the insertion of an attorney's fee in the sum for which the land is sold under a foreclosure sale by advertisement does not necessarily render the sale invalid in those cases where the attorney's fee is claimed in good faith. And the New York court of appeals, in the case of *Lewis v. Duane*,<sup>4</sup> say that the foreclosure by advertisement, for the full amount secured thereby, of a mortgage given to indemnify the mortgagee for existing and future indorsements and advances to pay off judgments against the mortgagor, is not for an amount in excess of that due the mortgagee, where it is less than the aggregate amount which he has already incurred and will certainly incur in the future on account of outstanding judgments for which he is liable.

§ 793. Postponement of sale.—The supreme judicial court of Massachusetts, in the case of *Clark v. Simmons*,<sup>5</sup> say that in those cases where, at an auction sale under a power contained in a mortgage, the only person present who will buy at all will offer only a small part of the well-known value of the property, the conditions which are impliedly essential to the execution of the power are wanting, and it is the duty of the mortgagee either to abandon his attempt to sell, or to adjourn the sale until he can obtain the presence of bidders. But in those cases where the property has been properly advertised, it is not the duty of the person conducting the sale under the power to postpone it to

<sup>1</sup> *Huyck v. Graham*, 82 Mich. 353; s. c. 46 N. W. Rep. 781; *Bowers v. Hechtman*, 45 Minn. 238; s. c. 47 N. W. Rep. 792.

<sup>2</sup> *Fagan v. People's Sav. & L. Assoc.*, 55 Minn. 437; s. c. 57 N. W. Rep. 142. See: *Ante*, § 708m.

As to mortgagee becoming pur-

chaser at his foreclosure by advertisement, See: *Post*, § 798.

<sup>3</sup> 178 Mich. 171; s. c. 43 N. W. Rep. 1100.

<sup>4</sup> 141 N. Y. 302; s. c. 36 N. E. Rep. 322; 57 N. Y. S. R. 410.

<sup>5</sup> 150 Mass. 357; s. c. 23 N. E. Rep. 108.

another day, where there are a dozen persons present and several bids are made, and the sale realizes more than the amount of the mortgage and the expenses of sale.<sup>1</sup>

§ 797. **Terms of sale.**—It is thought that in a sale on foreclosure by advertisement under a power in the mortgage, the payment of the purchase money is a matter between the mortgagee and the purchaser; the mortgagor having no other interest than to obtain the credit and benefit of the amount bid.<sup>2</sup> And where he gets that, neither he nor any other person who was not a beneficiary can complain because the payment was not made in cash.<sup>3</sup>

§ 798. **Mortgagee may become purchaser.**—The general rule is that a mortgagee may purchase at the sale under foreclosure by advertisement the same as at a sale on foreclosure by action;<sup>4</sup> and may come into equity to have his sale confirmed and his title perfected, and in his bill may offer to have the land resold at the option of the mortgagor;<sup>5</sup> such bill will not be dismissed for want of equity.<sup>6</sup>

§ 800. **Grounds for setting sale aside.**—The supreme court of Michigan, in the case of *Dohm v. Haskin*,<sup>7</sup> say that where notice given by a mortgagee at a sale by advertisement under a mortgage upon his co-tenant's interest in a will, that he should foreclose a chattel mortgage upon such interest in the machinery against any purchaser, is sufficient to invalidate the sale, although the co-tenant knew that it was for the same debt as the real-estate mortgage. And any unfairness and want of good faith on the part of a mortgagee who purchases the mortgaged property at such a sale will invalidate the sale, although he keeps within the letter of the statute.<sup>8</sup>

<sup>1</sup> *Stevenson v. Hano*, 148 Mass. 616; s. c. 20 N. E. Rep. 200.

<sup>2</sup> *Mewburn v. Bass*, 82 Ala. 622; s. c. 2 So. Rep. 520.

<sup>3</sup> *Jones v. Hagler*, 95 Ala. 529; s. c. 10 So. Rep. 345.

<sup>4</sup> *Lewis v. Duane*, 69 Hun (N. Y.) 28; s. c. 23 N. Y. Supp. 433; 52 N. Y. S. R. 818.

**As to purchase by mortgage on**

**sale in foreclosure by action, see full discussion, *Ante*, § 521 *et seq.***

<sup>5</sup> *Orr v. Blackwell*, 93 Ala. 212; s. c. 8 So. Rep. 413.

<sup>6</sup> *McHan v. Ordway*, 82 Ala. 463; s. c. 2 So. Rep. 276.

<sup>7</sup> 88 Mich. 144; s. c. 50 N. W. Rep. 108.

<sup>8</sup> *Newman v. Ogden*, 82 Wis. 53; s. c. 51 N. W. Rep. 1091.



A sale on foreclosure by advertisement will not be set aside because of the non-observance of a custom among auctioneers to place notices upon doors or windows of houses for sale, stating the time and place of sale.<sup>1</sup> Neither will a sale made under a power in the mortgage, in the absence of the mortgagee, without written authority to the auctioneer, who became purchaser thereof, be set aside on these facts alone after nine years.<sup>2</sup> And it has been held the fact that a notice of a trustee's sale under a deed of trust, which states specifically the locality of the property as to the section and subdivision thereof and its general metes and bounds, excepting portions thereof in such a way as not to show how much is actually to be sold, is not ground for setting aside the deed under the sale, unless resultant prejudice to the debtor therefrom is affirmatively shown.<sup>3</sup>

The supreme judicial court of Massachusetts, in the case of *Stevenson v. Hano*,<sup>4</sup> hold that a sale under a power in a mortgage will not be set aside because of the failure to adjourn it on account of the small attendance, where it had been properly advertised and there were about a dozen persons present, and several bids made, and the sale realized more than the amount of the mortgage and expenses.<sup>5</sup> But the supreme court of Maryland, in the case of *Chilton v. Brooks*,<sup>6</sup> say that a sale of land under a power in a mortgage of the property for \$1,000 or more below the market value, will be set aside where it was purchased by the mortgagee, and the sale was made on the day when the weather was so inclement as to prevent purchasers from attending.

§ 806. **Publishing notice of loan commissioners' sale.**  
—The supreme court of New York, in the case of *Good-*

<sup>1</sup> *Chilton v. Brooks*, 69 Md. 584; s. c. 16 Atl. Rep. 273. See: *Ante*, § 536d.

<sup>2</sup> *Welsh v. Coley*, 82 Ala. 363; s. c. 2 So. Rep. 733.

<sup>3</sup> *Loveland v. Clark*, 11 Colo. 265; s. c. 18 Pac. Rep. 544.

<sup>4</sup> 148 Mass. 616; s. c. 20 N. E. Rep. 200.

<sup>5</sup> As to duty to postpone sale in foreclosure by advertisement for want of sufficient bidders. See: *Ante*, § 793.

<sup>6</sup> 69 Md. 584; s. c. 16 Atl. Rep. 273.

hart v. Latting,<sup>1</sup> hold that the commissioners for loaning certain money of the United States, need not publish notices of mortgage foreclosures in the paper selected by the judges, under the New York statute,<sup>2</sup> in which legal notices are to be published, but may publish them in any newspaper printed in the county where the mortgaged premises are situated.

§ 812. **Sale firm and binding on all parties.**—The general rule is that in a foreclosure by advertisement made strictly as prescribed by statute, all questions that would have been determined in an equitable action will be settled by such sale. And the court of appeals of New York, in the case of *Lewis v. Duane*,<sup>3</sup> hold that a mortgagor with whose knowledge and approval the mortgagee makes a foreclosure sale by advertisement without discharging of record certain liens paid off by him under his contract with the mortgagor, and becomes the purchaser, cannot object that intending purchasers might have been prevented from bidding on account of an apparently double incumbrance on the property, especially where he is not injured thereby and he knew that no one but the mortgagee could afford to take the property burdened with its actual liability.

§ 814. **Purchaser's title—What passes by sale.**—The title of the purchaser of mortgaged premises on foreclosure by advertisement is not valid and perfect unless all the requirements of the statute under which it was made are substantially complied with.<sup>4</sup> Thus the sale is not complete until the affidavits of sale and publication and of service of notice and the certificate of sale are filed and recorded as required.<sup>5</sup> In each instance the statute in force

<sup>1</sup> 53 Hun (N. Y.) 26; s. c. 5 N. Y. Supp. 615; 24 N. Y. S. R. 618.

<sup>2</sup> N. Y. Laws 1874, c. 656.

<sup>3</sup> 141 N. Y. 302; s. c. 36 N. E. Rep. 322; 57 N. Y. S. R. 410.

<sup>4</sup> Thus it has been said that a certificate of foreclosure by publication, under Maine Revised Statutes, chapter 90, § 5, is fatally defective if

it recites that the notice was given in a newspaper "published," instead of "printed," in the county where the land lies. *Hollis v. Hollis*, 84 Me. 96; s. c. 24 Atl. Rep. 581.

<sup>5</sup> *Cowdry v. Turner*, 85 Hun (N. Y.) 451; s. c. 32 N. Y. Supp. 889; 16 N. Y. S. R. 207. See: *Crombie v. Little*, 47 Minn. 581; s. c. 50 N.

at the time of a foreclosure regulates the procedure; and the recording of a certificate of sale under a power in a mortgage ten months after the sale is a compliance with a statute which prescribes no period within which the certificate shall be recorded.<sup>1</sup>

The supreme court of Minnesota, in the case of *Crombie v. Little*,<sup>2</sup> say that an instrument purporting to be a sheriff's deed on foreclosure, made without authority of law, or in pursuance of a certificate which has become void for failure to record it, will operate as a certificate of sale, where it contains by way of recital or positive statement all the requisites of a certificate, except that it does not in express terms state that the land is subject to redemption.

Where all the requirements of the statute are complied with, the purchaser of a mortgaged estate at a sale under a power of sale is entitled to have it with the rights and easements appurtenant to it as they existed when the power of sale was given.<sup>3</sup>

### § 815. Defective foreclosure.—It is thought that a sale

W. Rep. 823; *Cable v. Minneapolis Stock Yards and P. Co.*, 47 Minn. 417; s. c. 50 N. W. Rep. 528; *Ryder v. Hulett*, 44 Minn. 353; s. c. 46 N. W. Rep. 559; *Crombie v. Little*, 47 Minn. 581; s. c. 50 N. W. Rep. 823; *Johnson v. Day*, 2 N. D. 295; s. c. 50 N. W. Rep. 701.

**In Minnesota—Failure to record certificate of sale** upon foreclosure of a mortgage, though invalidating the certificate, does not avoid the sale, but another certificate may be obtained from the sheriff. *Crombie v. Little*, 47 Minn. 581; s. c. 50 N. W. Rep. 823.

**Same—Sheriff's certificate of sale** upon foreclosure of a mortgage by advertisement under Minnesota General Laws 1862, chapter 19, § 3, is not invalidated by an error in stating the amount of the note secured by the mortgage, or by describing the

mortgage as executed on the day of its signing, when it was in fact acknowledged on the next day. *Cable v. Minneapolis Stock Yards & P. Co.*, 47 Minn. 417; s. c. 50 N. W. Rep. 528.

**In North Dakota—Sale by advertisement under a mortgage is not invalidated** by failure of the officer making it to comply with Dakota Compiled Laws, § 5420, by filing, within ten days after the sale, a duplicate certificate of sale in the office where the mortgage is recorded. *Johnson v. Day*, 2 N. D. 295; s. c. 50 N. W. Rep. 701.

<sup>1</sup> *Ryder v. Hulett*, 44 Minn. 353. s. c. 46 N. W. Rep. 559.

<sup>2</sup> 47 Minn. 581; s. c. 50 N. W. Rep. 823.

<sup>3</sup> *Bull's Petition*, 15 R. I. 534; s. c. 10 Atl. Rep. 484; 4 N. Eng. Rep. 748.

by advertisement under a mortgage providing for an attorney's fee is not invalidated by the fact that such fee was included in the amount for which the land was sold, without the affidavit required by the statute,<sup>1</sup> to entitle the mortgagee to collect the fee; but in such case, if the proceeds of the sale were sufficient to cover the mortgage debt and all the costs and disbursements, including such fee, the mortgagor may collect the amount of such fee from the officer making the sale.<sup>2</sup> The supreme court of Michigan say that a sale under statutory foreclosure by advertisement of a mortgage given as collateral to the debt of a third person, primarily secured by a chattel and a real estate mortgage, is void where the mortgagee has taken possession of the chattels without foreclosure or sale, and has taken no steps to foreclose the real estate mortgage.<sup>3</sup>

§ 820. Recording affidavits.—In those states where affidavits regulating the proceedings in foreclosure by advertisement are required to be recorded, the filing and recording are essential to the validity of the sale. Thus, under the New York Code,<sup>4</sup> the title of a mortgagee, who purchases the premises on foreclosure by advertisement, is not complete until the affidavits of sale and publication and of service of notice are filed and recorded.<sup>5</sup>

§ 824. A deed not necessary.—It is said by the supreme court of Wisconsin, in the case of *Nan v. Burnette*,<sup>6</sup> that under the statutes of that state<sup>7</sup>, no deed is required upon the sale of mortgaged premises under a power in the mortgage, when the purchaser is the assignee and holder of the foreclosed mortgage.

§ 824a. Deed to purchaser.—Where a deed is required and given on sale in foreclosure by advertisement under

<sup>1</sup> Dak. Comp. L. § 5429.

<sup>2</sup> *Johnson v. Day*, 2 N. D. 295; 2. c. 50 N. W. Rep. 701.

<sup>3</sup> *Drayton v. Chandler*, 93 Mich. 383; s. c. 53 N. W. Rep. 558.

<sup>4</sup> N. Y. Code Civ. Proc. §§ 2396-2398.

<sup>5</sup> *Cowdrey v. Turner*, 85 Hun (N.Y.) 451; 66 N. Y. S. R. 207; 32 N. Y. Supp. 889.

<sup>6</sup> 79 Wis. 664; s. c. 48 N. W. Rep. 649.

<sup>7</sup> Wis. Rev. Stat. 1878, § 3541.

power in a trust deed or mortgage, it is valid without a recital by the trustee in his deed to the purchaser of the exact date of the sale.<sup>1</sup> It has been said that there is a sufficient description and identification of the grantor in a deed to the purchaser at trustee's sale under a trust deed, where, although the trustee's name is not mentioned in the body of his deed, the recitals thereof furnish the means of clearly identifying him.<sup>2</sup> The supreme court of Michigan, in the case of *Cook v. Foster*,<sup>3</sup> say that such a deed is not void because the deed is executed by the undersheriff, and acknowledged before the sheriff in the capacity of a notary public, under the statute of that state,<sup>4</sup> providing that the sale may be made by the undersheriff among others, and the deed executed by the officer or person making the sale.

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<sup>1</sup> *Jones v. Hagler*, 95 Ala. 529; s. c. 10 So. Rep. 345.

<sup>2</sup> 96 Mich. 610; s. c. 55 N. W. Rep. 1019.

<sup>3</sup> *Jones v. Hagler*, 95 Ala. 529; s. c. 10 So. Rep. 345.

<sup>4</sup> 2 How. Mich. Stat. 8501, 8505.



## CHAPTER XXXV.

### STRICT FORECLOSURE.

- |                                      |                                                    |
|--------------------------------------|----------------------------------------------------|
| § 826. Nature of the remedy.         | § 835. Parties to a strict foreclosure.            |
| 827. Effect of strict foreclosure.   | 836. Who may maintain a strict foreclosure.        |
| 829. In what states allowed.         | 839. Judgment in strict foreclosure.               |
| 830. In what states not allowed.     | 841. Setting aside and opening strict foreclosure. |
| 831. Illinois doctrine and practice. |                                                    |
| 833. New York doctrine and practice. |                                                    |

§ 826. Nature of the remedy.—Strict foreclosure which operates to transfer the entire title of the property to the mortgagee, is a harsh remedy and looked upon with disfavor in this country. This method of foreclosure proceeds upon the theory that the mortgagee or purchaser has acquired the legal title and obtained possession of the estate, but that the right and equity of redemption have not been cut off or barred,<sup>1</sup> and that the legal title of the mortgagor having been acquired, the remedy by strict foreclosure is proper to cut off the right and equity of junior incumbrancers to redeem.<sup>2</sup>

§ 827. Effect of a strict foreclosure.—The effect of a strict foreclosure of a warranty mortgage is to perfect the warranted title by barring the mortgagor's right of redemption and terminating the conditional character of the conveyance. The deed, made absolute by foreclosure, continues between its parties to be a grant of the land on which it is foreclosed.<sup>3</sup> The foreclosure completes the mortgagor's sale of the warranted title in the payment of the debt, and does not apply in payment, without the warrantee's consent, merely the warrantor's right to redeem the land from a prior mortgage.<sup>4</sup> But the supreme court of Indiana, in

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<sup>1</sup> *Jefferson v. Coleman*, 110 Ind. 515; s. c. 11 N. E. Rep. 465; 9 West. Rep. 73.

(1468)

<sup>2</sup> *Id.*

<sup>3</sup> *Fletcher v. Chamberlin*, 61 N. H. 438.

*Id.*

the case of *Jefferson v. Coleman*,<sup>1</sup> say that a person holding the legal title to an undivided third in property sold under a foreclosure to which he was not a party cannot be deprived of her interest by a strict foreclosure.

In the case of *Champion v. Hinkle*,<sup>2</sup> the New Jersey court of chancery say: At common law in a strict foreclosure suit the decree simply cut off the equity of redemption and foreclosed the mortgagor from redeeming the estate by payment of the mortgage debt. Thereafter the mortgagee was in as of the estate granted and conveyed by the mortgage, discharged from the condition of defeasance, and he held the estate as if the original conveyance had been absolute.

§ 829. In what states allowed.—A strict foreclosure of a mortgage is allowed in Illinois,<sup>3</sup> Indiana,<sup>4</sup> Louisiana,<sup>5</sup> Maine,<sup>6</sup> Massachusetts,<sup>7</sup> Michigan,<sup>8</sup> Minnesota,<sup>9</sup> Missouri,<sup>10</sup> New Jersey<sup>11</sup> New York<sup>12</sup> and elsewhere. The supreme court of Indiana, in the case of *Jefferson v. Coleman*,<sup>13</sup> say that the owner of the legal title may maintain a strict foreclosure proceeding to bar the interest and cut off the equity and right of persons who have a prior lien upon or right of redemption in

<sup>1</sup> 110 Ind. 515; s. c. 11 N. E. Rep. 465; 9 West. Rep. 73.

<sup>2</sup> 45 N. J. Eq. (18 Stew.) 162; s. c. 16 Atl. Rep. 701; 12 New Jersey L. J. 87.

<sup>3</sup> See: *Post*, § 831.

<sup>4</sup> See: *Jackson v. Weaver*, 138 Ind. 539; s. c. 38 N. E. Rep. 166; *Loeb v. Tinken*, 124 Ind. 331; s. c. 24 N. E. Rep. 295; *Jefferson v. Coleman*, 110 Ind. 515; s. c. 11 N. E. Rep. 465; 9 West. Rep. 73.

<sup>5</sup> *Levy v. Lake*, 43 La. An. 1034; s. c. 10 So. Rep. 375.

<sup>6</sup> *Snow v. Pressey*, 82 Me. 552; s. c. 20 Atl. Rep. 78.

<sup>7</sup> *Shepard v. Richardson*, 145 Mass. 32; s. c. 11 N. E. Rep. 738; 4 N. Eng. Rep. 305.

<sup>8</sup> *Dohm v. Haskin*, 88 Mich. 144; s. c. 50 N. W. Rep. 108.

<sup>9</sup> *Backus v. Burke*, 48 Minn. 260; s. c. 51 N. W. Rep. 284; *Burke v. Baldwin*, 51 Minn. 181; s. c. 53 N. W. Rep. 460; *Burke v. Backus*, 51 Minn. 174; s. c. 53 N. W. Rep. 458.

<sup>10</sup> *Lewis v. Schwenn*, 93 Mo. 26; s. c. 2 S. W. Rep. 391; 6 West. Rep. 855.

<sup>11</sup> See: *Pettingil v. Hubbell* (N. J. Ch.), 32 Atl. Rep. 76; *Lockard v. Hendrickson* (N. J. Ch. 1892), 25 Atl. Rep. 512; *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162; s. c. 16 Atl. Rep. 701; 12 N. J. L. J. 87.

<sup>12</sup> See: *Post*, § 832.

<sup>13</sup> 110 Ind. 515; s. c. 11 N. E. Rep. 465; 9 West. Rep. 73.

the land.<sup>1</sup> The court say: "Such persons have a mere lien upon or an equity in the land, which is subordinate to the right of the owner of the legal title. The owner of the legal title may, with propriety, maintain a proceeding in the nature of a strict foreclosure, to bar the interest of the persons who have a mere lien upon, or right of redemption in, the land."<sup>2</sup> The supreme judicial court of Massachusetts, in the case of *Shepard v. Richardson*,<sup>3</sup> hold that a power of sale and the intervention of trustees do not necessarily take from the court the power to decree a strict foreclosure.

§ 830. In what states not allowed.—In Colorado,<sup>4</sup> Nebraska and many of the western states a mortgage cannot be foreclosed by strict foreclosure, but only by an action brought for that purpose, and by judgment and decree.<sup>5</sup>

§ 831. Illinois doctrine and practice.—Under the Illinois doctrine and practice a final decree in strict foreclosure expressly providing that in default of payment all the right, title and interest, both legal and equitable, of defendants, shall be vested absolutely and forever unconditionally in the complainants, is sufficient to make a complete transfer of the title, although under the English practice the title is not completely transferred until a final order based on proof that the money was not paid according to the terms of the decree.<sup>6</sup> A strict foreclosure may be decreed in Illinois wherever it is made to appear that the property affords but scant payment to a mortgagee, is deteriorating in value, and is standing idle and the mortgage indebtedness is increasing.<sup>7</sup> Also in those cases where it appears that the prop-

<sup>1</sup> See: *Boyer v. Boyer*, 89 Ill. 447, 449; *Farrell v. Parlier*, 50 Ill. 275; *American Insurance Co. v. Gibson*, 104 Ind. 336; s. c. 1 West. Rep. 834; *Catterlin v. Armstrong*, 101 Ind. 258, 267; *Shirk v. Andrews*, 92 Ind. 905; *Smith v. Brand*, 64 Ind. 427; *Shaw v. Heisey*, 48 Iowa 468; *Bolles v. Duff*, 43 N. Y. 469.

<sup>2</sup> *Bresnahan v. Bresnahan*, 46 Wis. 385; s. c. 1 N. W. Rep. 39.

<sup>3</sup> 145 Mass. 32; s. c. 11 N. E. Rep. 738; 4 N. Eng. Rep. 738.

<sup>4</sup> *Nevin v. Lulu & W. Silver Min. Co.*, 10 Colo. 957; s. c. 15 Pac. Rep. 611.

<sup>5</sup> *Nevin v. Lulu & W. Min. Co.*, 10 Colo. 357; s. c. 15 Pac. Rep. 611.

<sup>6</sup> *Ellis v. Leek*, 127 Ill. 60; s. c. 20 N. E. Rep. 218; 3 L. R. A. 259.

<sup>7</sup> *Illinois Starch Co. v. Ottawa Hydraulic Co.* 125 Ill. 237; s. c. 17 N. E. Rep. 486; 15 West. Rep. 56.

erty is of less value than the debt secured by the mortgage, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of his debt, a strict foreclosure may be allowed, although there is a judgment creditor who is also a purchaser at sheriff's sale of the equity of redemption in the premises.<sup>1</sup> The Illinois court of appeals, in the case of *Decker v. Patton*,<sup>2</sup> say that the fact that failure to perform the conditions may make a bill to redeem operate as a strict foreclosure will not make such bill subject to the rule against strict foreclosure, where third persons are interested in the property as purchasers or incumbrancers.

§ 833. **New York doctrine and practice.**—Under the New York doctrine and practice strict foreclosure will not be granted to cut off the rights of a second mortgagee who was not made a party on foreclosure of the prior mortgage, at which the mortgagee was a purchaser, where the failure to make the second mortgagee a party was known before the decree, and leave was given by the court to make him a party to the action, but was not accepted.<sup>3</sup>

§ 835. **Parties to a strict foreclosure.**—The supreme court of Indiana, in the case of *Loeb v. Tinkler*,<sup>4</sup> say that a strict foreclosure may be had against persons who are not made parties to a suit to foreclose a mortgage, where they have only a right of redemption by reason of marital relations with purchasers at a sale on execution issued on a judgment junior to the mortgage. And the court of chancery of New Jersey, in the case of *Pettingill v. Hubbell*,<sup>5</sup> say that a purchaser at a foreclosure sale of a portion of the mortgaged premises need not make the persons interested in the remaining lands parties to a bill for strict foreclosure

<sup>1</sup> *Illinois Starch Co. v. Ottawa Hydraulic Co.*, 23 Ill. App. 272, aff'd 125 Ill. 237; s. c. 17 N. E. Rep. 486; 15 West. Rep. 56

<sup>2</sup> 20 Ill. App. 210, aff'd 120 Ill. 464; s. c. 11 N. E. Rep. 897; 9 West. Rep. 501.

<sup>3</sup> *Moulton v. Cornish*, 138 N. Y. 133; s. c. 33 N. E. Rep. 842; 51 N. Y. S. R. 845; 20 L. R. A. 370.

<sup>4</sup> 124 Ind. 331; s. c. 24 N. E. Rep. 235.

<sup>5</sup> 32 Atl. Rep. 76 (1895).

against a defendant who purchased the same portion of the mortgaged premises from an owner of the whole premises, and, by mistake, was not made a party to the foreclosure suit.

§ 836. Who may maintain a strict foreclosure.—It is thought that strict foreclosure cannot be maintained upon real property, except by one having the record title thereto.<sup>1</sup> And it has been said that strict foreclosure of a mortgage cannot be had in favor of a mortgagee who purchased at a sale under foreclosure, against the holder of a sheriff's deed on execution sale against the mortgagor prior to the commencement of the foreclosure suit, who was not made a party to such suit.<sup>2</sup> The supreme court of Missouri, in the case of *Lewis v. Schwenn*,<sup>3</sup> say that a mortgagor, after forfeiture, may recover possession by ejectment without foreclosure.

In Louisiana, the holder of a mortgage with the pact *de non alienando*, who has proceeded against the mortgagor *via ordinaria* and recovered a judgment for his debt, with recognition of his mortgage, has the right to issue a *fiery facias* on such judgment and to seize the mortgaged property regardless of alienations, which are inoperative against such a mortgage, and without notice to or process against the third possessor.<sup>4</sup> But it is thought that judgment creditors holding liens on mortgaged premises have no option as to whether there shall be a strict foreclosure of the mortgage or a sale, where the bond has been discharged, the owner of the equity of redemption has surrendered it to the mortgagee, and the latter simply holds the mortgage as a muniment of title.<sup>5</sup>

<sup>1</sup> *Backus v. Burke* 48 Minn. 260; s. c. 51 N. W. Rep. 284. See: *Burke v. Baldwin*, 51 Minn. 181; s. c. 53 N. W. Rep. 460; *Burke v. Backus*, 51 Minn. 174; s. c. 53 N. W. Rep. 458.

<sup>2</sup> *Jackson v. Weaver*, 138 Ind. 539; s. c. 38 N. E. Rep. 166.

<sup>3</sup> 93 Mo. 26; s. c. 2 S. W. Rep. 391; 6 West. Rep. 855.

<sup>4</sup> *Levy v. Lake*, 43 La. An. 1034; s. c. 10 So. Rep. 375.

<sup>5</sup> *Lockard v. Hendrickson* (N. J. Ch.), 25 Atl. Rep. 512.



It is said, in the case of *Dohm v. Haskins*,<sup>1</sup> that a sale by advertisement under a mortgage, by an assignee whose assignment is not so acknowledged as to be entitled to record, is void under the Michigan statute regulating foreclosure by advertisement, and requiring both the mortgage and assignments to be recorded, although such assignment is in fact recorded.

§ 839. Judgment in strict foreclosure.—The court of chancery of New Jersey, in the case of *Pettingil v. Hubbell*,<sup>2</sup> say that on a bill for strict foreclosure brought by a purchaser at foreclosure sale of a portion of the mortgaged premises against a defendant who purchased the same portion from an owner of the entire premises and who was not made a party to the foreclosure suit, the court will determine upon the proofs the amount of the mortgage properly chargeable against the portion owned by the defendant. The supreme court of New York, in the case of *Moulton v. Cornish*,<sup>3</sup> hold that on denial of strict foreclosure to cut off a second mortgage, the ordinary decree of foreclosure may be allowed if necessary parties are brought in.

§ 841. Setting aside and opening strict foreclosure.—It is held that, under the Maine statute,<sup>4</sup> a mortgage is not effectually foreclosed by peaceably and openly taking possession in the presence of two witnesses, should the witnesses fail to state in their certificate the time of the entry,<sup>5</sup> and the foreclosure may be opened or set aside for irregularity.

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<sup>1</sup> 88 Mich. 144; s. c. 50 N. W. Rep. 108. Rep. 842; 51 N. Y. S. R. 845; 20 L. R. A. 370.

<sup>2</sup> 32 Atl. Rep. 76.

<sup>4</sup> Me. Rev. Stat. c. 90, § 3, cl. 3.

<sup>3</sup> 138 N. Y. 133; s. c. 33 N. E.

<sup>5</sup> *Snow v. Pressey*, 82 Me. 552; s. c. 20 Atl. Rep. 78.

## CHAPTER XXXVI.

### FEES, COSTS AND DISBURSEMENTS.

FEES OF REFEREE SELLING—COSTS IN GENERAL—WHEN DISCRETIONARY—  
WHO MAY HAVE—PRIOR AND JUNIOR LIENORS—GUARDIAN  
AD LITEM—STIPULATION FOR COUNSEL FEE—  
STATUTORY FORECLOSURE—COSTS IN  
DISTRIBUTING SURPLUS.

<p>§ 842. Fees of officer conducting sale.</p> <p>845. Costs in general.</p> <p>846. Costs in equitable actions to foreclose.</p> <p>848. Costs of foreclosure in discretion of court.</p> <p>851. Who may recover costs.</p> <p>852. Prior mortgagee entitled to costs.</p> <p>866. Counsel fee in foreclosing a mortgage.</p>	<p>§ 870. Allowance of attorney's fee a matter of contract or statute.</p> <p>871. Enforcement of counsel fee against purchaser.</p> <p>878. How disbursements allowed.</p> <p>883. Disbursement in surplus proceedings.</p> <p>883a. Same—Expenses for search.</p> <p>883b. Interest on advancements.</p> <p>883c. Interest on costs.</p>
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§ 842. Fees of officer conducting sale.—The supreme court of Maryland, in the case of *Johnson v. Glenn*,<sup>1</sup> say that commissions to the mortgagee or his assignee for the sale of the mortgaged property in case of default, are not included in the words "all expenses incident to such sale" in the direction in the mortgage that the proceeds of sale be first applied to such expenses.

§ 845. Costs in general.—It is competent for the parties to a foreclosure action to stipulate regarding the costs of the action and the payment thereof, and such stipulation will be enforced in those cases where the interests of a third person are not affected injuriously.<sup>2</sup> Thus the supreme court of Louisiana, in the case of *Regan's*

<sup>1</sup> 80 Md. 369; s. c. 30 Atl. Rep. 993.

(1474)

<sup>2</sup> *Cook v. Gilchrist*, 82 Iowa 736; s. c. *sub-nom.* *Cook v. Shorthill*, 48 N. W. Rep. 84. See: *Post*, § 870.

Succession,<sup>1</sup> say that a stipulation between a mortgagee and the executor of the mortgagor and his counsel, that he will not foreclose, but will permit the executor to sell the mortgaged property on credit, provided the executor and his counsel will not charge commissions or fees upon the proceeds, when plain and unambiguous, and free from fraud or error, will be enforced, and such fees stricken out on an accounting. The supreme court of South Carolina, in the case of the American Freehold Land Mortgage Company v. Moody,<sup>2</sup> say that the costs of an action are required to be first paid out of the proceeds of the whole property in those cases where the decree in foreclosure to which a second mortgagee and judgment creditors of the mortgagor are parties, holding the mortgagor entitled to a homestead, and providing that the mortgages are to be first paid out of the homestead, and the judgments out of the remainder of the property in the order of their priority; and further providing that out of the proceeds of the sale the sheriff pay, first, the costs of the action and expenses of the sale, and, next, to the plaintiff the amount of the mortgage debt and interest, which leaves a balance less than the amount of the second mortgage; and further providing that out of the remainder of the proceeds of sale, exclusive of costs and expenses, the sheriff pay the second mortgagee the amount of his debt, not to exceed as to both mortgages the sum regarded as the homestead, in exoneration of the property of the defendant in excess of the homestead, requires the costs of the action to be first paid out of the proceeds of the whole property.

§ 846. Costs in equitable actions to foreclose.—A mortgagee, on foreclosure, like a plaintiff in any other action, is entitled to his bill of costs, if he prevails. In those cases where the mortgage contains a stipulation for attorney's fees in case the mortgage is placed in the hands of an attorney for foreclosure, which is done and proceedings commenced, the mortgagor cannot stop foreclosure

<sup>1</sup> 43 La. An. 723; s. c. 9 So. Rep.

<sup>2</sup> 40 S.C. 187; s.c. 18 S.E. Rep. 677.

without paying the attorney's fees.<sup>1</sup> But the neglect of the mortgagee to file an affidavit of costs and disbursements as required by statute,<sup>2</sup> cannot affect the validity of a sale under the power in the mortgage.<sup>3</sup>

The supreme court of Illinois, in the case of *Cheltenham Improvement Company v. Whitehead*,<sup>4</sup> say that a trustee foreclosing a trust deed is not warranted in paying the cost of an abstract of title, under a provision in the deed authorizing him, in case of foreclosure, to pay certain specified claims, "also all other expenses of the trust."

§ 848. **Costs of foreclosure in discretion of court.**—The costs on a foreclosure of a mortgage are in the discretion of the court;<sup>5</sup> and in some states, as in Vermont,<sup>6</sup> the chancellor may require the defendant to furnish security for costs, when his defense is an affirmative claim, such as payment of a mortgage debt.<sup>7</sup> And in *Hollingsworth v. Koon*,<sup>8</sup> where the bill for an injunction was dismissed, and the land embraced in one of the mortgages was sold, but as to that sale the court found it had been prematurely and inequitably made, and that there was in fact less due to defendants than was claimed in the notes, it was held, by a divided court, that each party should have been required to pay his own costs.

§ 851. **Who may recover costs.**—In the case of *McCormick v. Bauer*,<sup>9</sup> where, by the failure of A to record an assignment to him of a mortgage for purchase money, it had become subordinated to a trust deed given by the original mortgagee after reconveyance to him; and appellants, claiming under subsequent trust deeds, sought

<sup>1</sup> *Mjones v. Yellow Medicine Co. Bk.*, 45 Minn. 335; s. c. 47 N. W. Rep. 1072. See: *Post*, §§ 866, 870.

<sup>2</sup> Minn. Gen. Stat. 1873, c. 31, § 23.

<sup>3</sup> *Johnson v. Cocks*, 37 Minn. 530; s. c. 35 N. W. Rep. 436.

<sup>4</sup> 123 Ill. 279; s. c. 21 N. E. Rep. 569.

<sup>5</sup> *House v. Eisenlord*, 102 N. Y. 713;

s. c. 7 N. E. Rep. 428; 3 Cent. Rep. 444.

<sup>6</sup> Under Rev. Laws, § 713.

<sup>7</sup> *Badger v. Taft*, 58 Vt. 585; s. c. *sub-nom.* *Badger v. Shaw*, 3 Atl. Rep. 585; 2 N. Eng. Rep. 116.

<sup>8</sup> 117 Ill. 511; s. c. 6 N. E. Rep. 148; 6 West. Rep. 49. See: *Koon v. Hollingsworth*, 97 Ill. 52.

<sup>9</sup> 122 Ill. 573; 13 N. E. Rep. 852; 11 West. Rep. 744.

to enforce their liens against lots,—successfully so far as the first trust deed is concerned,—and made no attempt to get rid of A's mortgage, it was held the appellants cannot claim that, because they have incidentally benefited the appellees, who claim through A, the appellees shall reimburse them the expenses of the litigation.

§ 852. **Prior mortgagees entitled to costs.**—The court of chancery of New Jersey, in the case of *Scott v. Somers*,<sup>1</sup> say that where the owner of different lots gives separate mortgages on the several lots to different persons, and afterwards gives a single mortgage on all the lots to another person, and the holder of the last mortgage on all the lots files a bill to foreclose, and makes prior mortgagees of each lot parties defendant, and they appear and prove their mortgages, and upon the sale not enough is realized to pay the amount of the first mortgage, costs must be borne by such prior mortgagees in proportion to the amount realized by them respectively. In this case the proceedings by the complainant were of great advantage to the several prior mortgagees. He procured a sale of all the lots at about what it would have cost each one of the prior mortgagees to sell one lot. In other words, it was a saving of about three-fourths of the cost to each one of the prior mortgagees. When these prior incumbrancers were made parties, they might each have asked to be dismissed with costs.<sup>2</sup> But it is well settled that in all cases where a prior incumbrancer, instead of asking to be dismissed, consents to a sale, and to take his principal and interest out of the proceeds, he must, as he thereby adopts the suit, and takes the benefit of it, contribute to the cost of it. In such a case the costs of all parties will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest.<sup>3</sup>

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<sup>1</sup> 9 Atl. Rep. (N. J. Ch. 1887) 718; 9 Atl. Rep. 718; s. c. 8 Cent. Rep. s. c. 8 Cent. Rep. 564.

<sup>2</sup> See: Dan. Chan. Pr. 1390. Eq. (13 Stew.) 491; s. c. 4 Atl. Rep.

<sup>3</sup> *Scott v. Somers* (N. J. Ch. 1887), 440.



§ 866. Counsel fee in foreclosing a mortgage.—It is said that the amount paid necessarily for lawyers' fees for preparing, or advising about the preparation, of advertisements for sale, and for drawing conveyances after the sale, of mortgaged property, and for advice for counsel, properly obtained, as to disposition of the surplus, should be allowed to the mortgagee;<sup>1</sup> and especially is this true in those cases where the mortgage so provides.<sup>2</sup> But the allowance of attorneys' fee without proper evidence of the amount of services rendered and the value thereof will be erroneous.<sup>3</sup> And it is said that a judgment in foreclosure is erroneous which directs the payment, out of the proceeds of the sale,

<sup>1</sup> *Snow v. Warwick Sav. Inst.*, 17 R. I. 66; s. c. 20 Atl. Rep. 94.

<sup>2</sup> *Haldeman v. Massachusetts Mut. L. Ins. Co.*, 21 Ill. App. 146, *affd.* 120 Ill. 390; s. c. 11 N. E. Rep. 526; 8 West. Rep. 635. See: *Lehman v. Comer*, 89 Ala. 579; s. c. 8 So. Rep. 241; *Hewitt v. Dean*, 91 Cal. 5; s. c. 25 Pac. Rep. 753; *Georgia R. & Banking Co. v. Pendleton*, 87 Ga. 751; s. c. 13 S. E. Rep. 822; *Butterfield v. Hungerford*, 68 Iowa 249; s. c. 68 N. W. Rep. 249; *Damon v. Deeves*, 62 Mich. 465; s. c. 29 N. W. Rep. 42; *Mjones v. Yellow Medicine County Bank*, 45 Minn. 335; s. c. 47 N. W. Rep. 1072; *Condict v. Fowler*, 47 Mo. App. 514; *Memphis & L. R. Co. v. Dow*, 120 U. S. 287; bk. 30 L. ed. 595; s. c. 7 Sup. Ct. Rep. 432.

In California a mortgage providing for a reasonable attorney's fee and a note secured thereby providing for a fee of 5 per cent. must be read together as one contract limiting such a fee to 5 per cent. *Hewitt v. Dean*, 91 Cal. 5; s. c. 25 Pac. Rep. 753.

In Illinois an agreement in a mortgage for an attorney's fee which is reasonable in amount, may be taxed as a part of the costs in

a suit to foreclose the mortgage. Such an agreement is valid in this state. *Haldeman v. Massachusetts Mut. L. Ins. Co.*, 120 Ill. 390; s. c. 11 N. E. Rep. 526; 8 West. Rep. 635.

**Notice of sale not included—**  
**When.**—The right of a lawyer who is trustee in an ordinary deed of trust, to necessary and reasonable charges and expenses, does not extend to an attorney's fee for writing the notice of sale, neither can he employ his partner to do it. *Condict v. Flower*, 47 Mo. App. 514.

**Fee must be paid to stop foreclosure.**—When a mortgage containing a stipulation for attorneys' fees in case placed in an attorney's hands for foreclosure, and the notice is drawn by him and set up in type by the printer, the attorneys' fees and printers' charges become part of the mortgage debt, so that the mortgagor cannot stop the foreclosure by paying the mortgage without paying them. *Mjones v. Yellow Medicine County Bank*, 45 Minn. 335; s. c. 47 N. W. Rep. 1072. See: *Ante*, § 846.

<sup>3</sup> *Butterfield v. Hungerford*, 68 Iowa 249; *Cook v. Gilchrist*, 82 Iowa 736; s. c. *sub nom.* *Cook v. Shorthill*, 48 N. W. Rep. 84.

of an allowance to the counsel of the commissioner who sells the land.<sup>1</sup>

In those cases where the mortgage provides for indemnifying the mortgagee or trustee against all costs, charges and expenses, this will cover a reasonable allowance for attorney's fees, to be determined by the court or chancellor upon the proper proofs.<sup>2</sup> And it has been said that where there is a stipulation in a mortgage in which the mortgagor agrees to pay the attorney's fee and other expenses incurred by the mortgagees in the collection of the several sums mentioned in the mortgage, by foreclosure or otherwise, for the payment of which the mortgage is a lien, although contained in a clause relating more especially to advances other than the leading consideration, is not confined to attorneys' fees paid in the collection of such other sums, but extends to the collection of all sums accruing to the mortgagees.<sup>3</sup>

In some of the states, as in Michigan, while the provision for an attorney's fee on foreclosure of a mortgage, contained in the power of sale, is operative and binding, it can only be enforced by a statutory foreclosure.<sup>4</sup>

In the supreme court of Georgia, in the case of Georgia Railroad and Banking Company v. Pendleton,<sup>5</sup> it is said that indorsers upon a note secured by mortgage, who, after judgment upon the note, waive in writing any objection to a clause in the mortgage providing for attorneys' fees, cannot insist that a judgment foreclosing the mortgage does not conclude them as to the creditor's right to payment of such attorneys' fees out of the proceeds of the mortgaged property.

§ 870. Allowance of attorney's fee a matter of contract or statute.—There cannot be an allowance of an at-

<sup>1</sup> Gay v. Davis, 107 N. C. 269; s. c. 12 S. E. Rep. 194.

<sup>2</sup> L'Engle v. L'Engle, 21 Fla. 131; Memphis & L. R. Co. v. Dow, 120 U. S. 287; bk. 30 L. ed. 595; s. c. 7 Sup. Ct. Rep. 482.

<sup>3</sup> Lehman v. Comer, 89 Ala. 579; s. c. 8 So. Rep. 241.

<sup>4</sup> Damon v. Deeves, 62 Mich. 465; s. c. 29 N. W. Rep. 42.

<sup>5</sup> 87 Ga. 751; s. c. 13 S. E. Rep. 822.

torney's fee over and above statutory costs, unless provided for in the mortgage.<sup>1</sup> A stipulation in a mortgage, that a reasonable attorney's fee shall be taxed by the court and included in the bill of costs in case of foreclosure, is legal, and may be enforced.<sup>2</sup> Such provision does not limit the court's authority to allowing an attorney's fee solely as a part of the bill of costs, but the court may make a special allowance therefor in its decree.<sup>3</sup> And it has been said a provision in a trust deed, that in case of breach the trustee may file a bill of foreclosure "in his own name or otherwise," and from the proceeds pay solicitor's fees, authorizes such payment, although foreclosure is brought by the holder of the debt secured.<sup>4</sup> But it is thought that when the mortgage authorizes a sale on default, and directs the payment, out of the proceeds, of "all costs of foreclosure, including attorney's fee," this refers only to a foreclosure by sale under the power, and does not authorize the allowance of an attorney's fee for filing a bill to foreclose.<sup>5</sup>

The supreme court of Oregon, in the case of *Balfour v. Davis*,<sup>6</sup> say that a stipulation in a mortgage for the payment, in case of suit, of twenty per cent. on the amount due, as attorney's fees, whether judgment should be recovered or not, is in violation of the rule of just compensation, as well as contrary to public policy, and that in such cases the court will not allow even a reasonable attorney's fee.

§ 871. **Enforcement of counsel fee against purchaser.**—The supreme court of the United States, in the case of *Meddaugh v. Wilson*,<sup>7</sup> say that where one of the

<sup>1</sup> The statutory attorney's fee may be allowed on foreclosure of a mortgage, where the bond secured by the mortgage provides for a reasonable fee, and there is no evidence as to what is a reasonable fee. *Cook v. Gilchrist*, 82 Iowa 736; s. c. *sub nom* *Cook v. Shorthill*, 48 N. W. Rep. 84.

<sup>2</sup> *Bynum v. Frederick*, 81 Ala. 849; s. c. 8 So. Rep. 198; *Grogan v. Nolan* (Cal. 1894), 36 Pac. Rep. 397; *L'Engle v. L'Engle*, 21 Fla. 13.

<sup>3</sup> *Grogan v. Nolan* (Cal. 1894), 36 Pac. 397.

<sup>4</sup> *Cheltenham Imp. Co. v. Whitehead* (Ill.), 21 N. E. Rep. 569.

<sup>5</sup> *Bynum v. Frederick*, 81 Ala. 489; s. c. 8 So. Rep. 198.

<sup>6</sup> 14 Oreg. 47; s. c. 12 Pac. Rep. 89.

<sup>7</sup> 151 U. S. 333; bk. 38 L. ed. 183; s. c. 14 Sup. Ct. Rep. 356.

purchasers of property at a foreclosure sale, which is subject to a charge thereon for the fees of the attorneys of an assignee in bankruptcy, has agreed to pay such fees out of a certain fund expected to be realized from a sale of the property, if that fund fails to be realized the property is not relieved from such charge, although the decree of sale was, by reason of such agreement, entered without any provision for the payment of such fees.

§ 878. **How disbursements allowed.**—On foreclosure of a mortgage an allowance will be made the plaintiff for expenses and services in the prosecution of the suit, where they are provided for in the mortgage;<sup>1</sup> this will include the amount paid for advertising and posters for the sale of the mortgaged property.<sup>2</sup> And a second mortgagee has a right, on foreclosure of his mortgage, to collect interest paid by him upon the first mortgage, but is not entitled to an assignment of any share of such mortgage.<sup>3</sup> But where a second mortgagee foreclosed and purchased at the sale, without making the first mortgagee a party, and subsequently the latter pays an assessment for street improvements binding on the property, but not on the purchaser personally, the one so paying cannot recover the amount paid from the purchasing mortgagee.<sup>4</sup> And it is said by the supreme court of New York, in the case of *Parker v. Collins*,<sup>5</sup> that a mortgagee who has advanced, upon the faith of his mortgage, moneys to procure the assignment to himself of a claim against the mortgagor, and not to pay the debt, stands in

<sup>1</sup> *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 41 Fed. Rep. 8; s. c. 7 Ry. & Corp. L. J. 30.

<sup>2</sup> *Snow v. Warwick Sav. Inst.*, 17 R. I. 66; s. c. 20 Atl. Rep. 94.

If an auctioneer employed to sell mortgaged property is absent and sends another auctioneer in his place under a special contract, the mortgagee, as expenses incurred for the sale of the property, is entitled only to the amount paid to the auctioneer

who sold it, and not to the amount which would have been due to the other if he had performed his agreement. *Snow v. Warwick Sav. Inst.*, 17 R. I. 66; s. c. 20 Atl. Rep. 94.

<sup>3</sup> *Magilton v. Holbert*, 52 Hun (N. Y.) 444; s. c. 24 N. Y. S. R. 96; 5 N. Y. Supp. 507.

<sup>4</sup> *Mutual L. Ins. Co. v. Sage*, 41 Hun (N. Y.) 535.

<sup>5</sup> 127 N. Y. 185; s. c. 27 N. E. Rep. 825; 38 N. Y. S. R. 269.

the same position as his assignor in respect to the right of the mortgagor to question the amount of the claim.

§ 883. **Disbursements in surplus proceedings.**—The supreme court of California, in the case of *Glide v. Dwyer*,<sup>1</sup> hold that a trustee named in a mortgage, who, with his own funds, purchased a first mortgage on a portion of the premises covered by the trust mortgage, is entitled, on foreclosure of such mortgage, to the amount so expended by him, out of the proceeds of the entire premises. It is the universal rule that a mortgagee who pays taxes on the mortgaged property because of default of the mortgagor in making the payments should be allowed the amount in his foreclosure suit.<sup>2</sup> And where the mortgage provides for the payment out of the proceeds of the sale of the mortgaged property all moneys advanced for taxes, the mortgagee is entitled to be repaid the sums expended by him to extinguish tax titles, and is not obliged to contest them, where it was obligatory on the mortgagor to pay the taxes.<sup>3</sup> On the same principle all payments of taxes and street assessments, made under authority given in the mortgage, after

<sup>1</sup> 83 Cal. 477; s. c. 23 Pac. Rep. 706.

<sup>2</sup> *Jackson v. Relf*, 26 Fla. 465; s. c. 8 So. Rep. 184. See: *German Sav. & L. Soc. v. Hutchinson*, 68 Cal. 52; s. c. 8 Pac. Rep. 627; *Windett v. Union Mut. L. Ins. Co.*, 144 U. S. 581; bk. 36 L. ed. 551; s. c. 12 Sup. Ct. Rep. 751; *Gormley v. Bunyan*, 138 U. S. 623; bk. 34 L. ed. 1086; s. c. 11 Sup. Ct. Rep. 453.

Upon a sale under a trust deed containing a covenant to pay all taxes and assessments on the property, the amount necessary to pay off the taxes, if not advanced before the sale, can be properly taken out of the proceeds. *Gormley v. Bunyan*, 138 U. S. 623; bk. 34 L. ed. 1086; s. c. 11 Sup. Ct. Rep. 453.

**School taxes cannot participate in the distribution of the proceeds of a mortgage sale** under Pennsylvania Local Act April 11, 1866, making such taxes a lien on realty, but not providing for their payment out of the proceeds of sale. *Barclay v. Leas*, 9 Pa. Co. Ct. 314.

<sup>3</sup> *Windett v. Union Mut. Ins. Co.*, 144 U. S. 581; bk. 36 L. ed. 551; s. c. 12 Sup. Ct. Rep. 751.

The lien of taxes alleged to have been paid by a mortgagee, and his privilege of subrogation to the rights of the state, cannot be enforced against the proceeds when marshalled for distribution, without clear proof that the taxes were paid, with the amounts and years stated. *Brady v. His Creditors*, 43 La. Ann. 165; s. c. 9 So. Rep. 59.



presentation of the claim against the estate of a deceased mortgagor, are properly allowable on foreclosure made without presentation.<sup>1</sup>

Whether or not taxes for the current year upon property purchased upon mortgage foreclosure should be paid by the purchaser, or out of the funds derived from the sale, depends upon whether or not such taxes were a lien on the property at the time of the sale ;<sup>2</sup> for the general rule is that a mortgagee who becomes the purchaser at a foreclosure sale takes the land subject to taxes which were levied upon the property after the mortgage was given.<sup>3</sup>

§ 883. Same—Expenses for search—Unofficial search. —The court of appeals of New York, in the case of *The Equitable Life Assurance Society v. Hughes*,<sup>4</sup> say that the expense of an unofficial search made by a title insurance company is not taxable as part of the disbursements on foreclosure of a mortgage, "according to the course and practice of the court," there being no express provision of law allowing such item, although the expense of an official search by a county clerk can be taxed. In this case, at the commencement of the action to foreclose, the plaintiff's attorney obtained a search of the title of the mortgaged premises from the Lawyers' Title Insurance Company of New York, a corporation organized under the laws of New York.<sup>5</sup> The plaintiff claimed the sum paid for this search should be taxed, as a lawful disbursement, in the bill of costs. Mr. Justice Earl, who writes the opinion of the court, discusses the question very fully, reviewing the statutes and authorities. He says, in part :

"There is nothing in the act under which the Lawyers' Title Insurance Company was organized making its searches official, or its certificates as to title evidence in any court.

<sup>1</sup> *German v. Sav. & L. Soc. v. Hutchinson*, 68 Cal. 52; s. c. 8 Pac. Rep. 627.

<sup>2</sup> *Cutting v. Tavares, O. & A. R. Co.*, 61 Fed. Rep. 150.

<sup>3</sup> *Wooten v. Sugg*, 114 N. C. 295; s. c. 19 S. E. Rep. 143.

<sup>4</sup> 125 N. Y. 106; s. c. 26 N. E. Rep. 1; 34 N. Y. S. R. 591; 19 Civ. Proc. Rep. 326; 11 L. R. A. 280.

<sup>5</sup> N. Y. Laws, 1885, c. 538.

The searches made by it have no greater force or value in the law than an unofficial search made by an individual; and unless the plaintiff would have been entitled to the taxation of this item if the search and charge therefor had been made by an individual, its claim fails. At common law, neither costs nor disbursements were allowed to the prevailing party in any case, and their allowance has always been regulated by statute. Unless, therefore, the plaintiff can point to some statute authorizing the clerk to allow and tax this item, the decision below is right. After costs and disbursements were allowed by law, they were confined to certain fees payable to counselors, solicitors and attorneys, and to payments made to officers who were entitled to charge fees for official services, and to the legal fees of witnesses. The first comprehensive statute in this state which we have been able to find regulating the fees of attorneys, counselors, solicitors and public officers, is the act of 1801.<sup>1</sup> That act was re-enacted, with some amendments, in the Revised Laws of 1813.<sup>2</sup> In these statutes, minute provisions were made for the fees of attorneys, counselors, solicitors, officers and witnesses, and the fees thus specified were all the fees which were taxable in favor of any party entitled to recover them. The whole subject of fees was again regulated by the Revised Statutes,<sup>3</sup> and in all these statutes it was made illegal and criminal for any officer or person to take or exact any other or greater fee than that specified in the law. Section 30, title 3, contained a general provision, as follows: 'The actual disbursements of a solicitor in the court of chancery, or of an attorney in the supreme court, necessarily incurred in cases not herein specified, which shall be proved by affidavits and shall be deemed reasonable by the taxing officer, may be allowed in the taxation of costs.' A similar clause, in the following language, was contained in the Revised Laws of 1813:<sup>4</sup> 'And the solicitor is to be allowed, in the taxation of costs,

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<sup>1</sup> N. Y. Laws, 1801, c. 190.

<sup>2</sup> 2 N. Y. Rev. Laws, 1813, p. 3.

<sup>3</sup> N. Y. Rev. Stat., pt. III, c. 10, titles 3, 4.

<sup>4</sup> 2 N. Y. Rev. Laws (1813), p. 13.

for all postages and other disbursements actually and necessarily incurred or paid in the cases not specified.' The precise scope of the clause, 'necessarily incurred or paid in the cases not specified,' is not entirely plain; but we believe it has always been construed to mean the fees of officers,—fees of same character as those mentioned, though not specified; and these general clauses have never been held to extend further. The sums disbursed by solicitors and attorneys for stationery, blanks, for traveling and tavern expenses, and for many other purposes, are necessary, and yet it has never been supposed that, under the general language above quoted, such items were taxable as disbursements.

"In *Kenney v. Vanhorne*,<sup>1</sup> it was held that the expenses of executing a commission were not to be taxed, because they were not within the provisions of the act regulating taxable costs and disbursements. In that the court said: 'The preparing or making up of cases for argument in the cause is not comprehended in any of the particular services specified in the act; and unless it comes within some one of the services provided for by the act, it cannot be taxed;' thus showing that, in the opinion of the court at that time, nothing could be taxed except what was particularly specified in the act.

"In *Hovey v. Hovey*,<sup>2</sup> it was held that the solicitor was not entitled to have taxed the expense of ascertaining the residence of the defendants as a necessary disbursement, and that the only disbursements which were properly taxable under the provisions in the fee bill were disbursements by the solicitors for postage, for exemplifications to be used in the suit, for necessary searches in the public officers, for the publication of notices required by law or the practice of the court, and other disbursements of a like nature. The chancellor said: 'There are many cases of disbursements by an attorney or solicitor for the benefit of his client, which are not taxable against the adverse party as costs in the cause, but which form a proper subject of allowance to

<sup>1</sup> 2 John. (N. Y.) 108.

<sup>2</sup> 5 Paige Ch. (N. Y.) 551.

the attorney or solicitor as against his own client.' The Code of Civil Procedure<sup>1</sup> now specifies the disbursements which a party entitled to costs may include in his bill, and it is as follows: 'A party to whom costs are not awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows: The legal fees of witnesses, and of referees and other officers; the reasonable compensation of commissioners taking depositions; the legal fees for publication, where publication is directed, pursuant to law; the legal fees paid for a certified copy of a deposition or other paper recorded or filed in any public office, necessarily used or obtained for use on the trial; the reasonable expenses of printing the papers for a hearing when required by a rule of the court; prospective charges for the expenses of entering and docketing the judgment, and the sheriff's fees for receiving and returning one execution thereon, including the search for property and such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law.' There is certainly nothing in this section which authorizes the taxation of this item, unless it be the last clause, and thus we are brought to the inquiry whether the item is taxable 'according to the course and practice of the court, or by express provision of law.' We are pointed to no express provision of law, and the sole inquiry, therefore, is whether it is taxable 'according to the course and practice of the court.' The supreme court, which must be presumed to be familiar with its own practice, holds that it is not thus taxable. This, the court could have determined from its own knowledge, without any other evidence. But its decision is amply supported by the evidence placed before it, and we can perceive no ground upon which we can reverse it. We are not presumed to know as well as that court the practice which prevails therein in such cases.

"There is no countenance for the taxation of this seen in any of the authorities to which our attention is here called.

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<sup>1</sup> N. Y. Code Civ. Proc. § 3256.

In *Perry v. Griffin*<sup>1</sup> it was held that nothing can be allowed on the taxation of costs for money paid to a commissioner to take testimony in another State, and for witnesses attending before the commissioner. A different rule was, however, laid down in *Finch v. Calvert*,<sup>2</sup> where it was held that the word 'disbursements,' mentioned in the Code,<sup>3</sup> has a more extensive meaning under the present than under the former system, and includes necessary expenses in executing a commission in a foreign State. In *Case v. Price*<sup>4</sup> it was held that the plaintiff in a foreclosure suit who employs a constable or private person to serve a summons and complaint and notice of the object of the action may recover, as disbursements, a reasonable sum for such service. In *Pierrepoint v. Lovelass*,<sup>5</sup> the expenses incurred by a party in serving subpoenas upon witnesses were not allowed as necessary disbursements. In *Provost v. Farrell*,<sup>6</sup> the fees paid to a stenographer, and for the preparation of maps to be used on the trial, were refused taxation as costs, although the law at that time empowered the courts to appoint stenographers, and regulated the price which they could charge for copies of notes. In *Colton v. Simmons*,<sup>7</sup> it was held that that compensation paid by the prevailing party to the stenographer for his services at the trial, can not be taxed as costs. In *Rothery v. New York Rubber Company*,<sup>8</sup> it was decided that a party could not include in his bill of costs the amount paid to the surveyor for making the survey and plans used on the trial. That decision was affirmed in this court.<sup>9</sup> In *Pfandler v. Sargent*,<sup>10</sup> the fees of a stenographer for a copy of his minutes were held not to be taxable as costs, even when procured by party to enable him to propose amendments to the case. In *Mark v. Buffalo*,<sup>11</sup> it was held that sums paid for plans and measurements, and compensation to experts, beyond their fees

<sup>1</sup> 7 How. (N. Y.) Pr. 263.

<sup>2</sup> 13 How. (N. Y.) Pr. 13.

<sup>3</sup> N. Y. Code Civ. Proc. § 311.

<sup>4</sup> 17 How. (N. Y.) Pr. 348.

<sup>5</sup> 4 Hun (N. Y.) 681.

<sup>6</sup> 13 Hun (N. Y.) 303.

<sup>7</sup> 14 Hun (N. Y.) 75.

<sup>8</sup> 24 Hun (N. Y.) 172.

<sup>9</sup> See *Rathey v. The New York Rubber Co.*, 90 N. Y. 30.

<sup>10</sup> 43 Hun (N. Y.) 154.

<sup>11</sup> 87 N. Y. 185.



as witnesses, were not properly taxable as necessary disbursements. There is no warrant in these authorities for holding that the expense of an unofficial search can be allowed as a disbursement."

§ 883b. **Interest on advancements.**—The supreme court of Iowa, in the case of *Butterfield v. Hungerford*,<sup>1</sup> say that where a mortgagee pays taxes and other prior claims to protect his own lien, he should not be allowed more than 6 per cent. per annum interest on such advances, as against a junior incumbrancer in a foreclosure proceeding, though he may have an agreement for 10 per cent. with the mortgagor.

§ 883c. **Interest on costs.**—When costs in a mortgage foreclosure are adjudicated and directed to be added to the security, that is equivalent to directing them to be charged on the estate<sup>2</sup> and they will carry interest from the date of the taxing, but not from that of the order of the court.<sup>3</sup> This is on the theory that a debt secured by a legal or an equitable mortgage will, unless something is said or may be implied to the contrary, carry interest; and it is thought to follow as a corollary that, when the court has once decided that there is a charge, the sum charged must bear interest.<sup>4</sup> But it is thought that interest on the costs under the judgment of foreclosure and decree of sale cannot be charged against the estate in those cases where they are not directed by the court to be added to the amount secured. Interest on the costs allowed in foreclosure was asked for in the case of

<sup>1</sup> 68 Iowa 249; s. c. 26 N. W. Rep. 136.

<sup>2</sup> *Eardley v. Knight*, L. R. 41 Ch. Div. 537, 540; s. c. 61 L. T. N. S. 780, 781.

<sup>3</sup> *Eardley v. Knight*, L. R. 41 Ch. Div. 537, 540; s. c. 61 L. T. N. S. 780, 781; *Lippard v. Ricketts*, L. R. 14 Eq. 241.

<sup>4</sup> *Lippard v. Ricketts*, L. R. 14 Eq. 241; *In re Kerr's Policy*, L. R. 8 Eq. 331.

**Equitable mortgages bear interest.**—*In re Kerr's policy*, *supra*, it was held that where a simple contract debt has been secured by deposit of title deeds, unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of a right to recover interest can be inferred, the mortgagee is entitled to interest on the debt. To the same effect is *Casey v. Doyne*, 5 Ir. Ch. Rep. 104.

Eardley v. Knight,<sup>1</sup> and Mr. Justice Kay said: "The defendants claim interest on those costs; that is to say, on costs in a foreclosure action. For that I find no principle or authority. If that were allowed in every case of foreclosure, the mortgagor could not redeem until payment, not only of principal, interest and costs, but also of interest on costs. I never heard of any such rule. But here it is said that there has been a decision at common law in the case of Pyman v. Burt,<sup>2</sup> that \* \* \* the costs should carry interest. But it does not follow that the costs are a charge on the estate.<sup>3</sup> The costs must be got from the mortgagor personally, not charged on the estate. Then I am told the judgment in the present case was the subject of appeal, and that the appeal was dismissed with costs, the order of the Court of Appeals directing that the costs of the appeal should be paid by the plaintiff to the defendants, and that the costs remaining unpaid by the plaintiff might be added by the defendants to their security. Adding the costs to the security was of course adding them to the capital moneys, and treating them as charged on the estate, and I have the authority of Lifford v. Ricketts,<sup>4</sup> which is a decision that, where costs are directed to be added to moneys secured by a deed, and to stand charged on the property comprised in the deed, the costs carry interest."

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<sup>1</sup> L. R. 41 Ch. Div. 537; s. c. 61 L. T. N. S. 780, 781.

<sup>2</sup> W. N. 1884, p. 100.

<sup>3</sup> This was a case where the mortgagor had brought an action to set aside the mortgage, which action was dismissed with costs, and on the

counter-claim the usual foreclosure decree was made, and an account directed as to what was due the defendants under the mortgage.

<sup>4</sup> L. R. 14 Eq. 291; s. c. 41 L. J. Ch. 595.

## CHAPTER XXXVII.

### REDEMPTION—NATURE AND EXTENT OF RIGHT.

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| <p>§ 884. Definition of redemption.</p> <p>885. Right of redemption.</p> <p>886. Origin of doctrine.</p> <p>887. Nature and extent of right.</p> <p>888. Reciprocal with right to fore-close.</p> <p>889. An incident of every mort-gage.</p> <p>890. Same — Exceptions to the rule.</p> <p>891. A creature of the law.</p> <p>892. Right an equitable one.</p> <p>893. A favorite of equity.</p> <p>894. Equitable and legal rights subject to.</p> <p>895. Assignment of mortgage on redemption.</p> <p>896. Waiver of right of redemp-tion.</p> <p>897. Surrender of right of re-demption.</p> <p>898. Stipulations and agreements barring.</p> <p>899. Right of an estate in lands.</p> | <p>§ 900. Same—Alabama doctrine.</p> <p>901. Same—Rule of property.</p> <p>902. Restriction of right of re-demption — To particular person.</p> <p>903. Same—To particular time.</p> <p>904. Same — By contract after breach of condition.</p> <p>905. Evasion of equitable rule.</p> <p>906. Payment of additional sum and taking of title.</p> <p>907. Sale of equity of redemption to mortgagee.</p> <p>908. Same—Setting sale aside.</p> <p>909. Same—Rule governing courts.</p> <p>910. Merger of mortgage in equity of redemption.</p> <p>911. Redemption money — Lien for.</p> <p>912. On sale under power.</p> <p>913. Extinguishment of right of redemption.</p> <p>914. Same—By action and sale.</p> |
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§ 884. Definition of redemption.—Literally speaking, the word redemption signifies the act of redeeming, or the state of being redeemed; a ransom, a purchase, a deliverance, a release. It comes from the Latin word *redimere*, to buy back.<sup>1</sup> In law, the redemption of land signifies the recovering or disencumbering of property by one who had a right or an interest—either legal or equitable—therein, subject to the lien of the encumbrance, or a defeasible conveyance.<sup>2</sup>

§ 885. Right of redemption.—The right of redemption is the right of the mortgagor, or any one who has a legal

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<sup>1</sup> Anderson's L. Dict. 886; VI Cent. Dict. & Cycl. 5099.

<sup>2</sup> *Id.* (1490)

or equitable interest in the land, to satisfy the mortgage and have the estate discharged therefrom.<sup>1</sup> At common law, upon the breach of the condition the estate vested in the mortgagee becomes indefeasible, but the hardship of this rule early won the leniency of the court of equity, and the mortgagor was allowed to redeem within a reasonable time, by paying the amount actually due; the debt being regarded as the principal thing. Eventually this estate came to be regarded as a distinct estate vested in the mortgagor, which is still jealously protected. In most, if not all, of the states, proceedings to foreclose the equity of redemption of the mortgagor and those claiming under him, are regulated by statute, and these regulations are a part of the contract.<sup>2</sup> The right of redemption from the lien of a mortgage before breach of condition, as we shall see hereafter,<sup>3</sup> is a legal right, and after breach of condition, it is an equitable right.<sup>4</sup> Used with strict propriety, the term "equity of redemption," is applicable to the equitable right only.

§ 886. **Origin of doctrine.**—The doctrine of the right of redemption was introduced into English jurisprudence from that great fountain-head of equitable doctrines,—the Roman or civil law. According to the doctrine of the

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<sup>1</sup> See: *Post*, Chapter XLII, "Terms, Conditions, Mode and Effects."

<sup>2</sup> See: *Smith v. People's Bank*, 24 Me. 185, 193; *Abraham v. Chenoweth*, 9 Oreg. 348, 351; *Walker v. King*, 44 Vt. 601, 612; *Peugh v. Davis*, 96 U. S. 337; bk. 24 L. ed. 775; *Clark v. Reyburn*, 75 U. S. (8 Wall.) 321; bk. 19 L. ed. 354.

In *Clark v. Reyburn*, *supra*, Mr. Justice Swayne says: "In this country the proceeding in most of the states, and, perhaps, in all of them, is regulated by statute. The remedy thus proscribed, when executed, enters into the convention of the parties in so far that any change

by legislative authority which affects is substantially, to the injury of the mortgagee, is held to be a law 'impairing the obligation of contracts,' within the meaning or the provision of the constitution." Citing: *Williamson v. Doe*, 7 Blackf. (Ind.) 13; *Bronson v. Kinzie* 42 U. S. (1 How. 311; bk. 11 L. ed. 143. The same is also the case regarding the interests and rights of the mortgagor.

<sup>3</sup> See: *Post*, §§ 887, 891, 892.

<sup>4</sup> See: *Post*, §§ 892, 893.

For history of doctrine of equity of redemption and the development of the doctrine, See: 3 Kerr on Real Prop., § 2086, *et seq.*

common law,<sup>1</sup> a mortgage was an estate upon condition, which became absolute upon the failure of the mortgagor to perform the condition on the law day, that is, on the day stipulated.<sup>2</sup> Under the equitable doctrine, failure to perform the condition upon the day stipulated, does not work a forfeiture of the property, but merely invests the mortgagee with authority to sell the property and from the proceeds arising from such sale to repay the debt or obligation, together with the costs of sale. In other words, under the equitable doctrine, a mortgage is merely a security for the payment of the debt. This principle was adopted by the courts of equity<sup>3</sup> to prevent the hardships and the injustice resulting at common law from a failure to comply with the conditions of the mortgage.

§ 887. Nature and extent of right.—Right to redeem from a mortgage is reciprocal with the right of foreclosure;<sup>4</sup>

<sup>1</sup> For full discussion, See: 3 Kerr on Real Prop., §2086; Wiltsie on Mort. Forc. (2nd ed.), § 2.

<sup>2</sup> At common law the mortgage was regarded as a conveyance of a conditional estate, and upon breach of its conditions, the estate became absolute; but to relieve the hardship of this rule, courts of equity gave to the mortgagor a right to redeem, upon payment of the debt secured, within a reasonable time. See: Goodenow v. Ewer, 16 Cal. 461; s. c. 76 Am. Dec. 540.

Same—In California a mortgage, whatever its terms, is not regarded as a conveyance of any interest vesting in the mortgagee enabling him to recover possession without a foreclosure and sale. See: Jackson v. Lodge, 36 Cal. 39; Dutton v. Worschauer, 21 Cal. 621; Lord v. Morris, 13 Cal. 433; Boggs v. Fowler, 16 Cal. 559; s. c. 76 Am. Dec. 561.

<sup>3</sup> See: Posten v. Miller, 60 Wis. 494; s. c. 19 N. W. Rep. 540.

<sup>4</sup> See: Post, § 888. Also: Boggs v. Fowler, 16 Cal. 559; s. c. 76 Am. Dec. 561; Goodenow v. Ewer, 16 Cal. 461; s. c. 76 Am. Dec. 540; Johnson v. Sherman, 15 Cal. 287; s. c. 76 Am. Dec. 481; Clark v. Baker, 14 Cal. 612; s. c. 76 Am. Dec. 449; Koch v. Briggs, 14 Cal. 256; s. c. 73 Am. Dec. 651; Haffley v. Maier, 13 Cal. 28; Nagle v. Macy, 9 Cal. 426; McMillan v. Richards, 9 Cal. 365; s. c. 70 Am. Dec. 655; Carpenter v. Bowen, 42 Miss. 28; Harper's Appeal, 64 Pa. St. 315.

In California, in the case of Goodenow v. Ewer, *supra*, the court say: "In this state, a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken. It is regarded, as in fact it is intended by the parties, as a mere security, operating upon the property as a lien or incumbrance only. Here the equitable doctrine is carried to its legitimate result. Between the view



it is a creature of the law,<sup>1</sup> and an incident of every mortgage.<sup>2</sup> The statutory right of redemption applies to sales under decrees in mortgage foreclosures as well as to sales under ordinary judgments at law.<sup>3</sup> And one entitled to redeem land from the holder of the legal title,

thus taken and the common-law doctrine—that the mortgage is a conveyance of a conditional estate—there is no consistent intermediate ground. In those states where the mortgage is sometimes treated as a conveyance, and at other times as a mere security, there is no uniformity of decision. The cases there exhibit a fluctuation of opinion between equitable and common-law views on the subject, and a hesitation by the courts to carry either views to its logical consequences. In *McMillan v. Richards*, 9 Cal. 365; s. c. 70 Am. Dec. 655, we had occasion to consider the subject at great length, and to observe upon the diversity existing in the adjudged cases. We there asserted what had previously been held in repeated instances, the equitable doctrine as the true doctrine respecting mortgages, and have ever since applied it under all circumstances. See: *Nagle v. Macy*, 9 Cal. 426; *Haffley v. Maier*, 13 Cal. 13; *Koch v. Briggs*, 14 Cal. 256; s. c. 73 Am. Dec. 651; *Clark v. Baker*, 14 Cal. 612; s. c. 76 Am. Dec. 449; and *Johnson v. Sherman*, 15 Cal. 287; s. c. 96 Am. Dec. 481. When, therefore, a mortgage is here executed, the estate remains in the mortgagor, and a mere lien or incumbrance upon the premises is created. The proceeding for a foreclosure of the equity of redemption, as those terms are understood where the common-law view of mortgages is maintained, is unknown to our system, so far, at least, as the owner of the estate is concerned. The mortgagee can here, in no case, be-

come the owner of the mortgaged premises, except by purchase, upon a sale under judicial decree consummated by conveyance. Proceedings in the nature of a suit to foreclose an equity of redemption, held by a subsequent incumbrancer, may undoubtedly be maintained by a purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right by virtue of his lien, and his equity of redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months. But the owner of the mortgaged premises, where no power of sale is embraced in the mortgage, cannot, under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. See: *Practice Act*, § 260; *Whitney v. Higgins*, 10 Cal. 547; s. c. 70 Am. Dec. 748; *Montgomery v. Tutt*, 11 Cal. 190. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose."

<sup>1</sup> See: *Post*, § 894.

<sup>2</sup> See: *Post*, § 889.

The right to redeem lands from a sale under foreclosure, under special circumstances, determined. *Goodrich v. Friedersdorff*, 27 Ind. 308.

<sup>3</sup> *McMillan v. Richards*, 9 Cal. 96; s. c. 70 Am. Dec. 655.

on the payment of a certain balance due, has the same right of redemption from the mortgagee of the legal title, on the payment of that sum.<sup>1</sup> But where a party is entitled to redeem from the foreclosure of a prior mortgage he cannot gain the title held by the purchaser in foreclosure proceedings except by redemption.<sup>2</sup>

It is said in the case of *Whitney v. Higgins*<sup>3</sup>, that parties to a foreclosure suit in which judgment is rendered under which a sale is made, are restricted to the statutory period in which to redeem. Their rights, after decree, depend entirely upon the statute, and they have no equity. Such is also the case with parties acquiring interests pending a suit to enforce previously existing claims; they take in subordination to any decree which may be rendered, as do those whose interests are acquired after judgment docketed or sale made.

In all those cases where a mortgage debt is not absolutely due on default of the payment of interest, but only at the election of the mortgagee duly declared, in the absence of his declaration the right to redeem and prevent the sale, on payment of the interest in arrears, is not destroyed by a stipulation in the mortgage authorizing a sale of the property as an entirety, and the payment of the whole debt, in case of a sale for any default, even though the whole debt should not be due.<sup>4</sup>

§ 888. *Reciprocal with right to foreclose.*—The right of a mortgagor, or those claiming under him, to maintain an action to redeem property from the lien of a mortgage, is reciprocal and commensurate with the right to foreclose. When one is barred the other is barred.<sup>5</sup>

<sup>1</sup> *Brooke v. Bordner*, 125 Pa. St. 470; s. c. 17 Atl. Rep. 467; 24 W. N. C. 53.

<sup>2</sup> *Simmons v. Taylor*, 38 Fed. Rep. 682.

<sup>3</sup> 9 Cal. 365; s. c. 70 Am. Dec. 748.

<sup>4</sup> *Chicago, D. & V. R. R. Co. v. Fosdick*, 106 U. S. 47; bk. 27 L. ed. 47; s. c. 1 Sup. Ct. Rep. 10.

<sup>5</sup> *Cunningham v. Hawkins*, 24 Cal.

403; s. c. 85 Am. Dec. 73; *Koch v. Briggs*, 14 Cal. 256; s. c. 73 Am. Dec. 651; *Caufman v. Sayre*, 2 B. Mon. (Ky.) 206; *King v. Meighen*, 20 Minn. 264. See: *Henderson v. Crammar*, 66 Cal. 336; *Wright v. Ross*, 36 Cal. 434; *Arrington v. Liscom*, 34 Cal. 372; s. c. 94 Am. Dec. 722; *Green v. Turner*, 38 Iowa 116.

This is a general rule recognized by all the text books and decisions. Hilliard, in his work on the law of mortgages, says: "In general, the respective rights of mortgagee and mortgagor with regard to a foreclosure on the one hand, and a redemption on the other, are treated as mutual; that is, the existence of the former is held to involve that of the latter, and *vice versa*; and the fact that the one cannot legally be enforced under the circumstances, is regarded as sufficient to preclude the claim for the other."<sup>1</sup>

§ 889. An incident of every mortgage.—The right of redemption is a legal incident of every mortgage, and is guarded by the courts with jealous care.<sup>2</sup> The rule that an instrument that is once a mortgage is always a mortgage is inflexible;<sup>3</sup> so that if a contract is in reality merely a security, no matter what may be the form of the instrument in which it is expressed, the right of redemption attaches and cannot be controlled by stipulations or agreements<sup>4</sup> designed to abridge or bar the right.<sup>5</sup> All the cases show that an absolute sale and defeasance in the same instrument must be a mortgage, and nothing but a mortgage.<sup>6</sup> The

<sup>1</sup> 2 Hill. on Mortg. 1.

<sup>2</sup> Lennell v. Lyford, 72 Me. 280.

<sup>3</sup> Simon v. Schmidt, N. Y. S. R. 388; Newcomb v. Bonham, 1 Vern. 8.

<sup>4</sup> See: Post, § 898.

<sup>5</sup> Lounsbury v. Norton, 59 Conn. 170; Tennery v. Nicholson, 87 Ill. 464; Bailey v. Bailey, 71 Mass. (5 Gray) 510; Kelleran v. Brown, 4 Mass. 443; Youle v. Richards, 1 N.J. Eq. (1 Saxt.) 534; s. c. 23 Am. Dec. 722; Clark v. Henry, 2 Cow. (N. Y.) 32, affirming s. c. *sub nom* Henry v. Davis, 7 John. Ch. (N. Y.) 40; Dunham v. Dey, 15 John. (N. Y.) 555; s. c. 8 Am. Dec. 282. James v. Johnson, 6 John. Ch. (N. Y.) 417; Dey v. Dunham, 2 John. Ch. (N. Y.) 189; Holridge v. Gillespie, 2 John. Ch. (N. Y.) 30; Gillis v. Martin, 2

Dev. (N. C.) Eq. 470; s. c. 25 Am. Dec. 792; Stoever v. Stoever, 9 Serg. & R. (Pa.) 434; Kerr v. Gilmore, 6 Watts (Pa.) 408; Stephens v. Sherrod, 6 Tex. 294; s. c. 55 Am. Dec. 776; Stamper v. Johnson, 3 Tex. 1; Peugh v. Davis, 96 U. S. 332; bk. 24 Law ed. 775; Watts v. Keller, 56 Fed. Rep. 1; Fontol, Eq. (4th Am. ed.) 494, note, 2 Story Eq. Jan. (13th ed.) § 1018.

<sup>6</sup> Kerr v. Gilmore, 6 Watts (Pa.) 408; Stephens v. Sherrod, 6 Tex. 294; s. c. 55 Am. Dec. 776.

An absolute deed, with a defeasance, is a mortgage: Reading v. Weston, 7 Conn. 143; s. c. 18 Am. Dec. 89; Washburn v. Merrills, 1 Dey (Conn.) 139; s. c. 2 Am. Dec. 59; Belton v. Avery, 2 Root (Conn.)

learned judge who delivered the opinion of the court in the

- 279; s. c. 1 Am. Dec. 70; Clark v. Lyon, 46 Ga. 202; Klock v. Walter, 70 Ill. 416; Ewart v. Walling, 42 Ill. 453; Preschbaker v. Feaman 32 Ill. 475; Tillson v. Moulton, 23 Ill. 648; Crassen v. Swoveland, 22 Ind. 427; Watkins v. Gregory, 6 Blackf. (Ind.) 113; Harbison v. Lemon, 3 Blackf. (Ind.) 51; s. c. 23 Am. Dec. 376; Montgomery v. Chadwick, 7 Iowa 114; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353; s. c. 20 Am. Dec. 145; McLaughlin v. Shepherd, 32 Me. 143; s. c. 52 Am. Dec. 646; Bennick v. Whipple, 12 Me. 346; s. c. 28 Am. Dec. 186; Chase's Case, 1 Bland. Ch. (Md.) 206; s. c. 17 Am. Dec. 277; Campbell v. Dearborn, 109 Mass. 130; s. c. 12 Am. Rep. 671; Woodward v. Pickett, 74 Mass. (8 Gray.) 617; Bayley v. Bailey, 71 Mass. (5 Gray.) 505; Erskine v. Townsend, 2 Mass. 493; s. c. 3 Am. Dec. 71; Archambau v. Green, 21 Minn. 520; Weide v. Gehl, 21 Minn. 449; Hill v. Edwards, 11 Minn. 22; Enos v. Sutherland, 11 Mich. 538; O'Neill v. Capelle, 62 Mo. 202; Sharkey v. Sharkey, 47 Mo. 543; Copeland v. Yoakum, 38 Mo. 349; Tibeau v. Tibeau, 22 Mo. 77; Wilson v. Drumrite, 21 Mo. 325; Youle v. Richards, 1 N. J. Eq., (1 Saxt.) 534; s. c. 23 Am. Dec. 722; Clark v. Henry, 2 Cow. (N. Y.) 324; affirming s. c. *sub nom.*; Henry v. Davis, 7 John. Ch. (N. Y.) 40; Dunham v. Dey, 15 John. (N. Y.) 554; s. c. 8 Am. Dec. 282; Dey v. Dunham, 5 John. Ch. (N. Y.) 189; Glover v. Payn, 19 Wend. (N. Y.) 518; Brown v. Dean, 3 Wend. (N. Y.) 208; Lane v. Shears, 1 Wend. (N. Y.) 433; Robinson v. Willoughby, 65 N. C. 520; Mason v. Hearn, 1 Busb. (N. C.) Eq. 88; King v. Kincey, 1 Ired. (N. C.) Eq. 187; s. c. 36 Am. Dec. 40; Gillis v. Martin, 2 Dev. (N. C.; Eq. 470; s. c. 25 Am. Dec. 729; Wilcox v. Morris, 1 Murph. (N. C.) L. 116; s. c. 3 Am. Dec. 678; Marshall v. Stewart, 17 Ohio 356; Perkins v. Dibble, 10 Ohio 433; s. c. 36 Am. Dec. 97; Harpers Appeal, 64 Pa. St. 319; Houser v. Lamont, 55 Pa. St. 311, 316; Guthrie v. Kahle, 46 Pa. St. 331; Rutenbaugh v. Ludwick, 31 Pa. St. 138; Friedley v. Hamilton, 17 Serg. & R. (Pa.) 70; s. c. 17 Am. Dec. 638; Johnston v. Gray, 16 Serg. & R. (Pa.) 361; Kelley v. Thompson, 7 Watts (Pa.) 405; Jaques v. Weeks, 7 Watts (Pa.) 268; Kerr v. Gilmore, 6 Watts (Pa.) 405; Colwell v. Woods, 3 Watts (Pa.) 188; s. c. 27 Am. Dec. 345; Manufacturers & Mechanics Bank v. Bank of Pennsylvania, 7 Watts & S. (Pa.) 334; s. c. 42 Am. Dec. 240; Hickman v. Cantrell, 9 Yerg. (Tenn.) 172; s. c. 30 Am. Dec. 396; Bennet v. Holt, 2 Yerg. (Tenn.) 6; s. c. 24 Am. Dec. 455; Baxter v. Dear, 24 Tex. 17; Dabney v. Green, 4 Hen. & M. (Va.) 101; s. c. 4 Am. Dec. 503; Ross v. Norvell, 1 Wash. (Va.) 14; s. c. 1 Am. Dec. 422; Hyndman v. Hyndman, 19 Vt. 9; s. c. 46 Am. Dec. 171; Klinck v. Price, 4 W. Va. 4; s. c. 6 Am. Rep. 268; Brinkman v. Jones, 44 Wis. 498; Plato v. Roe, 14 Wis. 453; Knowlton v. Walker, 13 Wis. 264; Second Ward Bank v. Upmann, 12 Wis. 499; Dow v. Chamberlin, 5 McL. C. C. 281.
- Equity looks to the substantial object of the conveyance**, and will consider an absolute deed as a mortgage, whenever it is shown to have been intended as a security; Fonbl. Eq. (4th Am. ed.) 494, note. See: Kelloran v. Brown, 4 Mass. 443; James v. Johnson, 6 Johns. Ch. (N. Y.) 417; Henry v. Davis, 7 John. Ch. (N. Y.) 40 Stover v. Stover, 9 Serg.

case of *Kerr v. Gilmore*<sup>1</sup> says: "Originally it would seem that what are now called mortgages, whether contained in one instrument or divided into an absolute deed and a defeasance on a separate paper, were considered at common law as sales on condition; and if the condition was not performed at the day, the estate became absolute, and could never be recovered; payment or tender, afterwards, were equally unavailing; and perhaps we may suppose this was the intention of one party, and the terms submitted to, by the other, under the infatuation which seems at all times to have cheered the heart of the debtor with the hope that he would soon be able to pay. It is unnecessary to inquire at what time and by what gradations courts of chancery took cognizance of, and relieved the creditor from, contracts which were often ruinously hard. The courts of law at length took notice that mortgages were only securities for money. 'The case of mortgages,' says Chancellor Kent,<sup>2</sup> 'is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principle over technical rules, and the homage which those principles have received by their adoption in courts of law.'" Hence, as long as the instrument is one of security, the borrower has the right to redeem, and a subsequent release of that right will be closely scrutinized to guard the debtor from oppression. It must be for a new and adequate consideration or it will not be upheld.<sup>3</sup>

The supreme court of Oregon, in the case of *Wilson v. Tarter*,<sup>4</sup> say that an owner of one of several parcels of land

& R. (Pa.) 434; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489 bk. 6 L. ed. 142.

"As to what constitutes a mortgage," says Story, 2 Story Eq. Jur. (13th ed.) §1018, "there is no difficulty whatever in courts of equity, although there may be technical embarrassment in courts of law. The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that wherever a conveyance, assignment, or other instru-

ment, transferring an estate, is originally intended, between the parties, as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or from any other, it is always considered in equity as a mortgage; and consequently is redeemable upon the performance of the conditions or stipulations thereof."

<sup>1</sup> 6 Watts (Pa.) 408.

<sup>2</sup> 4 Kent Com. (13th ed.) 158.

<sup>3</sup> *Linnell v. Lyford*, 72 Me. 280.

<sup>4</sup> 22 Oreg. 504; s.c. 30 Pac. Rep. 499.



sold under mortgage foreclosure without making him a party is not entitled to redeem the whole of the mortgaged premises against the wishes of the mortgagee, who has purchased on the sale; but the latter may elect whether to suffer such redemption or convey such parcel alone. And in some of the states there is no redemption, as a matter of right, from a sale of land by a county auditor under a school fund mortgage. In such a case the mortgagor seeking to recover the land so sold, has the burden of proving that the auditor, in making such sale, did not comply with the statutory requirements.<sup>1</sup>

§ 890. **Same—Exceptions to the rule.**—There are exceptions to the general rule as laid down in the preceding section. Thus it is said in *Parker v. Dacres*,<sup>2</sup> that in the state of Washington, while it was yet a territory, there was no equity of redemption in a mortgagor, and his equities had to be fixed by the court in its decree in the foreclosure suit. Nor can the provisions of the statute relating to redemption after execution sales be deemed to extend to mortgages.

Another exception is thought to be in favor of railroad mortgages. Thus, under the Illinois statute,<sup>3</sup> providing a right of redemption "where lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands," it is held that the lands and franchise of a railroad might be sold as an entirety, without the right of redemption as it could not have been the purpose of the legislature to compel a separate sale by which the value of each would be lost.<sup>4</sup>

§ 891. **A creature of the law.**—The right of redemption is not a right expressed in terms by the parties in the in-

<sup>1</sup> *Bonnell v. Ray*, 71 Ind. 141.

Sale by auditor under school-fund mortgage is not invalid because the affidavit of proof of publication of notice thereof is not signed by affiant; nor because, in offering the mortgaged and in parcels, the auditor did not designate or locate each particular quantity offered according to 1 Ind.

Rev. St. 1876, p. 801, § 96. *Bonnell v. Ray*, 71 Ind. 141.

<sup>2</sup> 2 Wash. Tr. 439 (1885).

<sup>3</sup> Ill. Rev. Stat. 1869, p. 397, § 27.

<sup>4</sup> *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Hammock v. Farmers' Loan & Trust Co.*, 105 U. S. 77; bk. 26, L. ed. 1111.

strument; but is a creature of the law, pure and simple. We have already seen<sup>1</sup> that no matter what may be the ostensible nature of the transaction, or the form of the instrument, if it is intended merely as a security for the payment of money, the right of redemption attaches.<sup>2</sup> The sale and right of redemption under a power in a mortgage are governed by the law in force at the time the mortgage was made.<sup>3</sup>

§ 892. **Right an equitable one.**—The right to redeem an estate under mortgage after a breach of the condition has occurred is an equitable right which cannot be enforced in a suit at law.<sup>4</sup> And where the mortgagee has entered for condition broken, the only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee refuses to relinquish possession of the mortgaged premises, is by bill in equity.<sup>5</sup> After a mortgaged debt is once discharged, there is no question but that the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title.<sup>6</sup>

§ 893. **A favorite of equity.**—The right to redeem is a favorite equity, and will not be allowed to be taken away, except upon a strict compliance with the steps necessary to divest it.<sup>7</sup> Thus the mortgagee will not be permitted to extinguish the mortgagor's equity of redemption by a sale under execution at law, upon a judgment obtained upon the mortgage debt, although the possession has been removed by action at law; but the mortgagor will be entitled to file his bill to redeem.<sup>8</sup>

<sup>1</sup> See: *Ante*, § 889.

<sup>2</sup> See: *Plato v. Roe*, 14 Wis. 453; *Knowlton v. Walker*, 13 Wis. 264; *Orton v. Walker*, 3 Wis. 576; *Rogan v. Walker*, 1 Wis. 527; *Seton v. Slade*, 7 Ves. 265, 273; s. c. 6 Rev. Rep. 124; *Spurgeon v. Collier*, 1 Eden. 55, 60.

<sup>3</sup> *Smith v. Green*, 41 Fed. Rep. 455.

<sup>4</sup> *Randall v. Bradley*, 65 Me. 43; *Cranston v. Crane*, 97 Mass., 459; s. c. 93 Am. Dec. 106; *Chapin v. Wright*, 47 N. J. Eq. 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 59.

<sup>5</sup> *Brobst v. Brock*, 77 U. S. (10 Wall.) 519; bk. 19, L. ed. 1002.

<sup>6</sup> *Smith v. Orton*, 62 U. S. (21 How.) 241; bk. 16, L. ed. 104.

<sup>7</sup> *Chicago, D. & V. R. R. Co. v. Fosdick*, 106 U. S. 47; bk. 27, L. ed. 47; *Bigler v. Waller*, 81 U. S. (14 Wall.) 297, bk. 20 L. ed. 891; *Shillaber v. Robinson*, 97 U. S. 68; bk. 24 L. ed. 967.

<sup>8</sup> *Powell v. Williams*, 14 Ala. 476; s. c. 43 Am. Dec. 105. In this case the question whether a mortgagee of real estate could cause the mortgaged

In the case of *Clarkson v. Creely*,<sup>1</sup> where real estate was conveyed in trust to secure the payment of a debt, and the creditor stated that he should not sell the property without first giving actual notice of his intention so to do, and afterwards sold the property without giving such notice, the sale was set aside and the debtor had permission to redeem.

In California, since the enactment of the civil code,<sup>2</sup> a mortgagee who forecloses a deed, absolute in form, but in fact a mortgage, without at the same time foreclosing another deed given to secure the same indebtedness, but upon different property, is not entitled to a personal judgment for deficiency, the right of the mortgagor to redeem is not affected by the fact that no judgment for deficiency has been docketed.<sup>3</sup> The statute of a State<sup>4</sup> validating the record of conveyances previously made, can not have any effect upon previous foreclosures, or deprive land owners of their right to redeem mortgaged premises.<sup>5</sup>

§ 894. **Equitable and legal rights subject to.**—The supreme court of Tennessee, in the case of *Beasom v. Porterfield*,<sup>6</sup> say that an equitable interest is subject to redemption, as well as a legal interest; but the purchaser of land at a chancery sale acquires an equitable title, upon the implied condition that the purchase money shall be paid at the time stipulated, the payment of the consideration being essential to complete the equity; and if the land be sold,

premises to be levied upon and sold under a *fiери facias* to satisfy the debt intended to be secured was presented to the court for the first time. The Court say: "It has been repeatedly held that the interest of a mortgagor in possession, at least before forfeiture, and perhaps afterwards, may be sold under an execution at law against his estate, at the suit of a third person; and that the purchaser would acquire a right to the possession as against the mortgagor, as well as the equity of redemption. See: *McGregor & Darling v. Hall*, 3 Stew. & P. (Ala.) 397; *Perkins & Elliott v. Mayfield*, 5 Port. (Ala.) 182;

*Cullum v. Emanuel*, 1 Ala. 23; s. c. 34 Am. Dec. 757; *Doe ex dem. Duval's heirs v. McLoskey*, 1 Ala. 708; *P. & M. Bank v. Willis*, 5 Ala. 770; *Stover v. Herrington*, 7 Ala. 142; s. c. 41 Am. Dec. 86; *The Br. Bank at Mobile v. Hunt*, 8 Ala. 876; *Duval's Heirs v. The P. & M. Bank*, 10 Ala. 636."

<sup>1</sup> 40 Mo. 114.

<sup>2</sup> Cal. Civ. Code § 726.

<sup>3</sup> *Hall v. Arnott*, 80 Cal. 348; s. c. 22 Pac. Rep. 200.

<sup>4</sup> As Minn. Act, Feb. 27, 1885.

<sup>5</sup> *Lowry v. Mayo*, 41 Minn. 388; s. c. 43 N. W. Rep. 78.

<sup>6</sup> 3 Head (Tenn.) 363.

under the decree of the court, to enforce the payment of the purchase money, the land is not subject to redemption.

§ 895. **Assignment of mortgage on redemption.**—The general rule is that the right to redeem a mortgage does not carry with it the right to an assignment of the mortgage, unless the redeeming party occupies the position of surety for the mortgage debt.<sup>1</sup> A judgment creditor with a lien on the land, on coming in to redeem is entitled to an assignment of the mortgage where it is necessary to protect his interest.<sup>2</sup> And a junior mortgagee, on redeeming, may have an assignment of the mortgage, although he does not occupy the position of surety, in those cases where a satisfaction of the prior mortgage would not be as beneficial to the junior mortgagee as an assignment of it.<sup>3</sup>

§ 896. **Waiver of right of redemption.**—The right of the mortgagor and those claiming under him to redeem from the mortgage lien by payment of the mortgage debt being a creature of the law,<sup>4</sup> and an incident of every mortgage,<sup>5</sup> commensurate with the right to foreclose,<sup>6</sup> it cannot be abandoned or waived by any stipulation of the parties made at the time the instrument is executed,<sup>7</sup> where the real intention of the parties is to secure the payment of the debt and not to extinguish it,—even though embodied in the mortgage itself.<sup>8</sup> Thus the supreme court of the

<sup>1</sup> Bigelow v. Cassedy, 26 N. J. Eq. (11 C. E. Gr.) 557. See: Helt v. Ellis, 31 Iowa 86; s. c.

Thus in Helt v. Ellis, *supra*, where in a proceeding to redeem from a foreclosure sale of land, on account of alleged irregularities in the appointment of appraisers, an order was made that the plaintiff might redeem within a certain time, the court held that he was not entitled to have brought into court for his use whether he redeemed or not, a mortgage for purchase money held by the defendants from one to whom they had sold after their purchase at the foreclosure sale, and who was not shown to have had any notice of the alleged irregularities in the sale.

<sup>2</sup> See: Niagara Bank v. Rosevelt, 9 Cow. (N. Y.) 409; Dauchy v. Ben-net, 7 How. Pr. (N. Y.) 375.

<sup>3</sup> Twombly v. Cassidy, 82 N. Y. 155; Pardee v. Van Auken, 3 Barb. (N. Y.) 534.

<sup>4</sup> See: *Ante*, § 891.

<sup>5</sup> See: *Ante*, § 889.

<sup>6</sup> See: *Ante*, § 888.

<sup>7</sup> See: *Post*, § 898.

<sup>8</sup> Baxter v. Willey, 9 Vt. 276; s. c. 31 Am. Dec. 623; Hiles v. Milwaukee Power & Light Co., 85 Wis. 90; s. c. 55 N. W. Rep. 175; Peugh v. Davis, 96 U. S. 332; bk. 24 L. ed. 775.

In Wisconsin, in the case of Hiles v. Milwaukee Power & Light Co., 85 Wis. 90; s. c. 55 N. W. Rep. 175,

United States, in the case of *Peugh v. Davis*,<sup>1</sup> say that it is an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security the borrower has, in a court of equity, the right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who under pressing circumstances will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity and thus prevent the condition from being enforced and the property sacrificed. The body of American and English decisions are to the same effect.<sup>2</sup> Not only is this doctrine in accord with the weight of American and English decisions, but it is thought that no case can be found in which it has been determined that the mortgagee can by force of any agreement, made at the time of creating the mortgage, entitle himself at his own

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the court say that the right given by the statute of that State to redeem mortgaged premises after judgment of foreclosure is in the nature of an exemption, and cannot be waived or shortened by the agreement of the mortgagor.

<sup>1</sup> 96 U. S. 337; bk. 24 L. ed. 775.

<sup>2</sup> *Fields v. Helms*, 82 Ala. 449; *Parmer v. Parmer*, 74 Ala. 285; *Pritchard v. Elton*, 38 Conn. 434; *Workman v. Greening*, 115 Ill. 477; *Bearss v. Ford*, 108 Ill. 16; *Willets v. Burgess*, 34 Ill. 494; *Skemmer v. Miller*, 5 Litt. (Ky.) 84; *Linnell v. Lyford*, 72 Me. 280; *Baxter v. Child*, 39 Me. 112; *Waters v. Randall*, 47 Mass. (6 Met.) 479; *Nugent v. Riley*, 42 Mass. (1 Met.) 117; s. c. 35 Am. Dec. 355; *Wilson v. Drumrite*, 21 Mo. 325; *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Cooper v. Whitney*, 3

*Hill* (N. Y.) 95; *Palmer v. Gumrey*, 7 Wend. (N. Y.) 248; *Hauser v. Lamont*, 55 Pa. 81, 311; *Wharf v. Howell*, 5 Binn. (Pa.) 499; *Heister v. Fortner*, 2 Binn. (Pa.) 43; *Rankin v. Mortimere*, 7 Watts (Pa.) 372; *Jaques v. Weeks*, 7 Watts (Pa.) 277; *Heister v. Maderia*, 7 Watts & S. (Pa.) 384; *Wheeland v. Swartz*, 1 Yeates (Pa.) 584; *Cherry v. Bowen*, 4 Sneed (Tenn.) 415; *Burrow v. Henson*, 2 Sneed (Tenn.) 658; *Bennett v. Holt*, 2 Yerg. (Tenn.) 6; *Chapman v. Turner*, 1 Call, (Va.) 281; s. c. 1 Am. Dec. 514; *Pennington v. Hanby*, 4 Munf. (Va.) 140; *King v. Newman*, 2 Munf. (Va.) 40; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Davis v. Demming*, 12 W. Va. 246; *Plato v. Roe*, 14 Wis. 453; *Knowlton v. Walker*, 13 Wis. 264; *Orton v. Knob*, 3 Wis. 576; *Jackson v. Lawrence*, 117 U. S. 679;



election, to hold the estate free from condition, and cutting off the right in equity of the mortgagor to redeem.<sup>1</sup>

A court of equity will set aside any agreement by mortgagor contemporaneous with the execution of the mortgages by which he waives, unduly fetters, or agrees not to exercise, his equity of redemption in event of default of the payment of the debt; but a subsequent agreement to convey for a fair consideration, made in order to avoid the expense of foreclosure, and reserving to the mortgagor the same right to redeem as if the property was sold under foreclosure, and showing no fraud or undue advantage, will be sustained.<sup>2</sup> And the court of chancery of New Jersey, in the case of *Heald v. Jardin*,<sup>3</sup> say that a mere statement by counsel for the owner of the equity of redemption in mortgaged lands made at a casual meeting on the street, that he does not think the owner will exercise his right to redeem, does not amount to a waiver of such option.

It is said by the supreme court of Alabama, in the case of *Commercial Real Estate and Building Loan Association v. Parker*,<sup>4</sup> that in those cases where the mortgagor sells his equity of redemption, or assigns his interest in the mortgaged premises to another before sale thereof, this will constitute an abandonment of the statutory right of redemption, even though his assignee cannot exercise the right.

§ 897. Surrender of right of redemption.—The mortgagor may surrender his right in the equity of redemption, thus rendering the mortgage absolute,<sup>5</sup> but this equity of redemption being a right in real estate, it cannot be released

bk. 29 L. ed. 1024; *Peugh v. Davis*, 96 U. S. 337; bk. 24 L. ed. 775; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142; *Casborne v. Scarfe*, 1 Atk. 603; *Goodman v. Grierane*, 2 Ball & B. 278; *Jason v. Eyres*, 2 Ch. Cas. 33; *East India Co. v. Atkyns*, 1 C. B. 349; *Floyer v. Lavington*, 1 Pr. Wms. 268; *Newcomb v. Bonham*, 2 Vent. 364; *Howard v. Harris*, 1 Vern. 191; *Seton*

*v. Slade*, 7 Ves. 273; s. c. 6 Rev. Rep. 124.

<sup>1</sup> See: *Waters v. Randall*, 47 Mass. (6 Met.) 479.

<sup>2</sup> *Stoutz v. Rouse*, 84 Ala. 309; s. c. 4 So. Rep. 170.

<sup>3</sup> 21 Atl. Rep. 586, 1890.

<sup>4</sup> 84 Ala. 298; s. c. 4 So. Rep. 268.

<sup>5</sup> *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534; s. c. 23 Am. Dec. 722,

or surrendered except by an instrument in writing,<sup>1</sup> or such facts must be shown as will estop him from asserting any interest in the premises,<sup>2</sup> a mere parol agreement being insufficient under the statute of frauds to convert a mortgage into an absolute deed.<sup>3</sup> But a release or surrender, to be valid, must be founded upon an adequate consideration;<sup>4</sup> any marked under valuation of the property in the price paid will vitiate the proceedings.<sup>5</sup> Thus the supreme court of the United States, in the case of *Russell v. Southard*,<sup>6</sup> say that the surrender of the right to redeem, by a mortgagor in possession, will be closely scrutinized by a court of equity; and in those cases where it is obtained by the mortgagee denying the right to redeem, for no consideration, or as a condition to the correction of a mistake which in equity he was bound to correct, the surrender will be set aside by the court.

§ 898. *Stipulations or agreements barring.*—The equity of redemption is a right in the land which is inseparably annexed to the mortgage, and cannot be dis-annexed therefrom, even by the express stipulation of the parties.<sup>7</sup> This is a right that is not subject to be controlled by the agreement of the parties,<sup>8</sup> even though contained in the mort-

<sup>1</sup> *Clark v. Condit*, 18 N. J. Eq. (3 C. E. Gr.) 358; *Peugh v. Davis*, 96 U. S. 332; bk. 24 L. ed. 775.

<sup>2</sup> *Peugh v. Davis*, 96 U. S. 332; bk. 24 L. ed. 775.

<sup>3</sup> *Clark v. Condit*, 18 N. J. Eq. (3 C. E. Green) 358.

<sup>4</sup> *Brownlee v. Martin*, 21 S. C. 392; *Brick v. Brick*, 98 U. S. 514; bk. 25 L. ed. 256; *Peugh v. Davis*, 96 U. S. 332; bk. 24 L. ed. 775; *Morgan v. Shinn*, 82 U. S. (15 Wall.) 105; bk. 21 L. ed. 49.

<sup>5</sup> *Peugh v. Davis*, 96 U. S. 332; bk. 24 L. ed. 775.

<sup>6</sup> 53 U. S. (12 How.) 139; bk. 13 L. ed. 927.

<sup>7</sup> *Stephens v. Sherrod*, 6 Tex. 294; s. c. 55 Am. Dec. 776; *Lucketts v.*

*Townsend*, 3 Tex. 119; s. c. 49 Am. Dec. 723. See: 2 Story Eq. Jan. (13th ed.) § 1019.

<sup>8</sup> *Fields v. Helms*, 82 Ala. 449; s. c. 3 So. Rep. 106; *Parmer v. Parmer*, 74 Ala. 285; *Lounsbury v. Norton*, 59 Conn. 170; *Bearss v. Ford*, 108 Ill. 16; *Tennery v. Nicholson*, 87 Ill. 464; *Willeys v. Burgess*, 34 Ill. 494; *Preschbaker v. Feaman*, 32 Ill. 475; *Wynkoop v. Cowing*, 21 Ill. 570; *Linnell v. Lyford*, 72 Me. 280; *Baxter v. Child*, 39 Me. 110; *Bailey v. Bailey*, 71 Mass. (5 Gray.) 510; *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534; s. c. 23 Am. Dec. 722; *Henry v. Davis*, 7 John. Ch. (N. Y.) 40; affirmed *sub nom*; *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Holridge v.*

gage itself,<sup>1</sup> for, as Lord Eldon has said: "You shall not, by special terms, alter what this court says are, the special terms of that contract."<sup>2</sup> Thus the courts have held void agreements and stipulations tending to alter the original nature of the mortgage, in any subsequent event, so as to cut off the equity of redemption,<sup>3</sup> as well as agreements or stipulations at the time of the contract, that the purchaser should, in default of the debtor, become the absolute owner, if the subject was once redeem-

Gillespie, 2 John. Ch. (N. Y.) 30; Gillis v. Martin, 2 Dev. (N. C.) Eq. 470; s. c. 25 Am. Dec. 729; Cherry v. Bowen, 4 Sneed (Tenn.) 415; Peugh v. Davis, 96 U. S. 332; bk. 24 Law ed. 775; Fry v. Porter, 1 Chan. Cas. 141; East India Co. v. Atkins, Comy. 347, 349; James v. Oades, 2 Vern. 402; Seton v. Slade, 7 Ves. 273; s. c. 6 Rev. Rep. 124.

In the case of *Tennery v. Nicholson*, 87 Ill. 464, a debtor conveyed land by a deed absolute on its face, taking a written agreement for a reconveyance on payment of the debt. Afterwards he gave a new note for \$1,071, taking a similar agreement, wherein time was made of the essence of the contract, and which provided that in case of failure to pay on the day named, "the intervention of equity is forever barred." Failing to pay, and believing his right of redemption gone, he promised to pay \$2,000 at ten per cent., and took another agreement for a deed. The court held the equity of redemption could only be cut off by a foreclosure, and that the last promise was, for want of consideration, not binding on him.

The court of chancery of New Jersey, in the case of *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534; s. c. 23 Am. Dec. 722, say: "If the

conveyance is a mortgage in the beginning, the right of redemption is an independent incident, and cannot be restrained or clogged by agreements." *Henry v. Davis*, 7 John Ch. (N. Y.) 40, 42. Such an agreement, says Fontlanque, would be contrary to natural justice in the creation of it, and prove a general mischief, because every lender would, by this method, make himself chancellor in his own case, and prevent the judgment of the court; 2 Fonbl. 259. See, also, *Fry v. Porter*, 1 Ch. Cas. 141; *James v. Oades*, 2 Vern. 402; *Seton v. Slade*, 7 Ves. 273; s. c. 6 Rev. Rep. 124; and 1 Pow. on Mort. 116, *et seq.*

<sup>1</sup> *Clark v. Henry*, 2 Cow. (N. Y.) 324; affirming s. c. *sub nom* *Henry v. Davis*, 7 John Ch. (N. Y.) 405.

A subsequent agreement by which the mortgagor is to forfeit the land absolutely if the debt is not paid on the day stated, may be void as well. *Tennery v. Nicholson*, 87 Ill. 464; *Batty v. Snook*, 5 Mich. 231.

<sup>2</sup> *Seton v. Slade*, 7 Ves. 273; s. c. 6 Rev. Rep. 124. See: *Toomes v. Conset*, 3 Ark. 261; *Floyer v. Livingston*, 1 Pr. Wm. 268.

<sup>3</sup> *Lounsbury v. Norton*, 59 Conn. 170; s. c. 20 Atl. Rep. 153; *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534; s. c. 23 A. D. 722.

able.<sup>1</sup> In an old case<sup>2</sup> it is said that if a man makes a mortgage and covenants not to bring a bill to redeem, and even goes so far, as in Stisted's Case, as to take an oath that he will not redeem, yet he shall redeem.

The doctrine of common law, as improved and modified by the principles of the civil law, was that an equity of redemption could not be cut off except by a foreclosure, and that is the general rule in this country to-day, in the absence of any statute controlling. Thus, it has recently been held by the United States circuit court of appeals, sitting in the eighth circuit, that an election by the grantee in an absolute deed constituting a mortgage in equity, to avail himself of an option therein to retain the property in satisfaction of the loan, will not operate to bar the equity of redemption, but such equity can be barred only by a proper foreclosure.<sup>3</sup>

It is said, in *Cottingham v. Springer*,<sup>4</sup> the common law rule, that an equity of redemption can be cut off only by a foreclosure in equity, does not prevail in Illinois; and that by a sale under an execution, on a judgment for a debt secured by a mortgage, and by a sheriff's deed to the mortgagee, he acquires the equity of redemption, which, united with his estate under the mortgage, gives him the absolute title. And in *Cook v. McFarland*,<sup>5</sup> the court say that parties to an action of foreclosure may stipulate that sales upon a decree therein shall be absolute and without redemption; and a decree and sale based thereon is in effect an adjudication binding upon the parties as well as subsequent incumbrances.

§ 899. Right of an estate in lands.—The general rule is that the equity of redemption is a real and beneficial estate in lands, which may be sold and conveyed by the mort-

<sup>1</sup> *Henry v. Clark*, 7 John Ch. (N. Y.) 40; *aff'd sub nom. Clark v. Henry*, 2 Cow. (N. Y.) 324; *Stone v. Barnds*, 1 Ohio St. 107; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470; s. c. 25 Am. Dec. 729. \*

<sup>2</sup> *East India Co. v. Atkins*, 1 Comy. 347, 349.

<sup>3</sup> *Watts v. Kellar*, 56 Fed. Rep. 1.

<sup>4</sup> 88 Ill. 90.

<sup>5</sup> 78 Iowa 528; s. c. 43 N. W. Rep. 519.

gagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage.<sup>1</sup> On conveyance, the assignee takes the land subject to the mortgage and the covenants thereon, which may be enforced against the land in the same manner and to the same extent as if the assignment had not been made.<sup>2</sup>

The equity of redemption being a right to real estate, it cannot be released or surrendered, except by an instrument in writing,<sup>3</sup> or such facts are shown as will estop the party from asserting any interest in the premises.<sup>4</sup> Yet the supreme court of Ohio have held, in the case of *Shaw v. Walbridge*,<sup>5</sup> that in those cases where a deed absolute on its face is claimed by the grantor to be a mortgage, it is competent to show that, although originally a mortgage, the equity of redemption has been released by parol.

§ 900. Same—Alabama doctrine.—In some of the states the general rule, as laid down in the last section, does not prevail. Thus, it is held in Alabama that the right of redemption given by the code of that state<sup>6</sup> is distinct and different from the common law equity of redemption; and it is personal to the debtor, that it is not property, and therefore is not capable of passing to an assignee of the equity of redemption.<sup>7</sup>

§ 901. Same—A rule of property.—The general rule is that a state statute, with rules of practice of state courts framed for enforcement of it, declaring a right of redemption of mortgaged property on foreclosure, is a rule of property, and is obligatory on federal courts deciding on claims and interests in real property within the state.<sup>8</sup> It

<sup>1</sup> *McMillan v. Richards*, 9 Cal. 365; s. c. 70 Am. Dec. 655.

<sup>2</sup> *Schooley v. Romain*, 100 Ad. 87.

<sup>3</sup> *Clark v. Coudit*, 18 N. J. Eq. (3 C. E. Gr.) 358; *Peugh v. Davis*, 96 U. S. 332; bk. 24 L. ed. 775.

<sup>4</sup> *Peugh v. Davis*, 96 U. S. 332; bk. 24 L. ed. 775.

<sup>5</sup> 33 Ohio St. 1.

<sup>6</sup> Ala. Code, 1886, §1879, *et seq.*

<sup>7</sup> *Powers v. Andrews*, 84 Ala. 289;

s. c. 4 So. Rep. 263; *Aiken v. Bridgeford*, 84 Ala. 295; s. c. 4 So. Rep. 266; *Commercial Real Estate & Bldg. Asso. v. Parker*, 84 Ala. 298; s. c. 4 So. Rep. 268.

The case of *Bailey v. Timberlake*, 74 Ala. 221, is overruled.

<sup>8</sup> *Berne v. Hartford Fire Ins. Co.*, 96 U. S. 627; bk. 24 L. ed. 858. See, also, authorities two foot notes following.



has been repeatedly held that the statutory right of redemption after a sale under a decree of foreclosure is a rule of property in the state where in force, and must be observed in the federal courts equally with those of the state.<sup>1</sup> But while the local law giving the right of redemption first to the mortgagor, then to judgment creditors, is a rule of property obligatory upon the federal court, the latter may prescribe the mode in which redemption from sales under its own decrees may be effective.<sup>2</sup>

§ 902. Restriction of right to redeem—To particular person.—The right to have a mortgage lien discharged from the premises by payment of the debt and to redeem the same, being inseparably connected with every mortgage,<sup>3</sup> any agreement or stipulation appearing as a restriction of the right of redemption to the mortgagor personally is inconsistent with the nature of a mortgage, and therefore void.<sup>4</sup> As it has been said that whenever it clearly appears to have been the intention of the parties that the land conveyed shall be subject to redemption, the right of redemption cannot be limited in time or to a particular person or persons.<sup>5</sup> This is upon the ground that if the conveyance is a mortgage in the beginning, the right of redemption is an independent incident and cannot be restrained or clogged by any agreements,<sup>6</sup> because such a restriction would be contrary to natural justice and might work oppression to the mortgagor.<sup>7</sup>

<sup>1</sup> Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51; bk. 27 L. ed. 648; Swift v. Smith, 102 U. S. 442; bk. 27 L. ed. 193; Orvis v. Powell, 98 U. S. 176; bk. 25. L. ed. 238; Brine v. Hartford Fire Ins. Co., 96 U. S. 627; bk. 24 L. ed. 858; Metropolitan Nat. Bank of N. Y. v. Connecticut Mut. L. Ins. Co., bk. 24 L. ed. 1011. (Not in official edition.)

<sup>2</sup> Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51; bk. 27 L. ed. 648.

<sup>3</sup> See: *Ante*, § 839.

<sup>4</sup> Johnson v. Gray, 16 Serg. & R.

(Pa.) 361; s. c. 16 Am. Dec. 577; Spurgeon v. Collier, 1 Eden 551; Howard v. Harris, 1 Vern. 33; Newcomb v. Bonham, 1 Vern. 8.

<sup>5</sup> Youle v. Richards, 1 N. J. Eq. (1 Saxt.) 534; s. c. 23 Am. Dec. 722.

<sup>6</sup> Youle v. Richards, 1 N. J. Eq. (1 Saxt.) 534; s. c. 23 Am. Dec. 722; Henry v. Davis, 7 John. Ch. (N. Y.) 40, 42.

<sup>7</sup> 2 Fonbl. 259. See: Fry v. Porter, 1 Ch. Cas. 141; James v. Oades, 2 Vern. 402; Seton v. Slade, 7 Ves. 273; s. c. 6 Rev. Rep. 124.

It is thought, however, some restrictions upon the right of redemption are not open to the objection above pointed out, and are therefore binding upon the mortgagor and all those claiming under him. Thus in the case of *Bonham v. Newcomb*,<sup>1</sup> the mortgagor limited the right of redemption to his own life for the purpose of benefiting, by way of settlement, the mortgagees who was some near relative, reserving to himself the right to redeem at any time during his own life, and the arrangement was upheld. And in the case of *Stover v. Bounds*,<sup>2</sup> where the owner of a certificate of entry of land from the United States assigned such certificate as security for a debt, with a condition of defeasance, it was held that the right of the original assignor to redeem was not affected by a provision in the condition of defeasance limiting his time to redeem to a fixed period after the transaction, such limitation not affecting the vested right of redemption.

§ 903. Same—To particular time.—The restricting of the time of redemption to a period other than that named in the statute will not, as a general rule, bar the right to redeem.<sup>3</sup> Thus it is said that the restriction of the right of redemption to one year in an absolute deed, with an agreement that it shall be void if a certain debt is not paid within a year, is null.<sup>4</sup> But the Supreme Court of Wisconsin, in the case of *Hills v. Milwaukee Power and Light Company*<sup>5</sup> say that if a stipulation by an attorney acting under a warrant

<sup>1</sup> 2 Vent. 364; s. c. 1 Vern. 8.

<sup>2</sup> 1 Ohio St. 107.

<sup>3</sup> *Stover v. Bounds*, 1 Ohio St. 107.

<sup>4</sup> *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534; s. c. 22 Am. Dec. 722; *Winton's Appeal*, 87 Pa. St. 17.

In *Winton's appeal*, *supra*, a decree rendered in Pennsylvania in 1875, from which an appeal was taken in 1878, an amendment was made five days afterwards, as follows: "And upon the plaintiff's failure to make said payment for a period of thirty days after the filing of this order, and notice of

the same to him, that he, the said plaintiff, be for ever barred from all claim to and equity of redemption in the said 'Vosburg third.'" The court held, that this action was erroneous, as it was an attempt to bar a mortgagor's equity of redemption, which in this State can only be extinguished by his own agreement, by some act done by himself that estops him, or by a judicial sale.

<sup>5</sup> 85 Wis. 90; s. c. 55 N. W. Rep. 175.

of attorney in a mortgage, shortening the time for redemption given by the Wisconsin statute after judgment of foreclosure to ten days, is a valid consent on the part of the mortgagor to a sale at that time, such consent being sufficient to warrant a sale under the statutes of that state<sup>1</sup> postponing sales of mortgaged premises of one year after judgment of foreclosure, but providing that the parties may, by stipulation in writing filed with the clerk, consent to an earlier sale, where all the parties to the action—especially subsequent mortgagees or incumbrancers—do not file such a consent.

§ 904. Same—By contract after breach of condition.—We have already seen,<sup>2</sup> that the equitable right of redemption is a creature of the law, and not of contract,<sup>3</sup> and that the parties are not permitted by special agreement to disannex from the mortgage, at the time of its execution, that which the law has declared shall be annexed to it.<sup>4</sup> The reason of this rule is to prevent undue oppression of debtors by creditors. A like rule has been applied, for similar reasons, to the statutory right of redemption.<sup>5</sup> This rule, however, does not apply to any fair and *bona fide* purchase of the right of redemption, which is entered into subsequently to the execution of the mortgage;<sup>6</sup> but courts of equity will scan such transactions with watchfulness, and will declare them void where procured by fraud, either actual or constructive, including any unconscionable advantage, or undue influence, or where made on a consideration which is grossly inadequate.<sup>7</sup> This is on a parity of reasoning with the doctrine that where an owner of an equity of redemption agreeing with the mortgagees not to ask an adjournment to procure an order for a sale of the lands in parcels, in consideration of the mortgagees' bidding in the land and giving

<sup>1</sup> Wis Rev. Stat. 3162.

<sup>2</sup> See: *Ante*, § 891.

<sup>3</sup> *Stoutz v. Rouse*, 84 Ala. 809; s. c. 4 So. Rep. 170.

<sup>4</sup> See: *Ante*, §§ 889, 898.

<sup>5</sup> *Stoutz v. Rouse*, 84 Ala. 809; s. c. 4 So. Rep. 170

<sup>6</sup> *Stoutz v. Rouse*, 84 Ala. 809; s. c. 4 So. Rep. 170. See: *Heald v. Jardine*, 21 Atl. Rep. 586.

<sup>7</sup> *Stoutz v. Rouse*, 84 Ala. 809; s. c. 4 So. Rep. 170; *McKinstry v. Conly*, 12 Ala. 678; *Hitchcock v. Bank*, 7 Ala. 386, 443.

him the right to redeem within a stated time, stands in the same relation to the mortgagees after the sale, that he did before, and is entitled to redeem within the time limited.<sup>1</sup>

There is much reason for the rule that, in the absence of fraud, undue influence or unconscionable advantage, the mortgagor may, at any time after the execution of the mortgage, by a new and separate contract, sell or release his equity of redemption to the mortgagee for a consideration that is not grossly inadequate.<sup>2</sup> In all such cases, however, a court of equity will examine strictly into the facts in order to ascertain that the transaction is a perfectly fair and independent proceeding, and entirely unconnected with the original contract of mortgage.<sup>3</sup>

It is thought that the mortgagor may, for a valuable consideration, reduce his equity of redemption to a statutory right of redemption. The mortgagee certainly has a right to go into a court of chancery and foreclose his mortgage by due process of law. Where he does so, the result is to cut off the mortgagor's equity of redemption, and convert it into a statutory right of redemption; thus vesting the legal title of the estate absolutely in the mortgagee, subject to the right of the mortgagor, and certain other persons in privity with him, to redeem the premises on terms specified in the statute, and within the time fixed from the date of the foreclosure. This is true where the mortgagee himself buys at the foreclosure sale, or even under a power in the mortgage.<sup>4</sup> There is no apparent reason why the mort-

<sup>1</sup> Heald v. Jardine, 21 Atl. Rep. (N. J. Ch. 1891) 586.

<sup>2</sup> McKinstry v. Conly, 12 Ala. 678; Austin v. Bradley, 2 Dey (Conn.) 466; Wynkoop v. Cowing, 21 Ill. 570; Hicks v. Hicks, 5 Gill. & J. (Md.) 75; Trull v. Skinner, 34 Mass. (17 Pick.) 213; Remsen v. Hay, 2 Edw. Ch. (N. Y.) 535; Russell v. Southard, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927.

Locke v. Palmer, 26 Ala. 312; Mills v. Mills, 26 Conn. 213; Brown

v. Gafney, 28 Ill. 149; Baugher v. Merriman, 32 Md. 185; Holridge v. Gillespie, 2 John. Ch. (N. Y.) 30; Hyndman v. Hyndman, 19 Vt. 9; s. c. 46 Am. Dec. 171; Villa v. Rodrigues, 79 U. S. (12 Wall.) 323; s. c. *sub nom* Alexander v. Rodrigues, bk. 20 L. ed. 406; Russell v. Southard, 53 U. S. (12 How.) 139, 154; bk. 13 L. ed. 927, 933; Webb v. Rorke, 2 Sch. & L. 661, 673.

<sup>4</sup> Stoutz v. Rouse, 84 Ala. 809; s. c. 4 So. Rep. 170; Mewburn v. Bass, 82

mortgagor and the mortgagee may not provide by a fair contract without resort to the courts for doing precisely what the law would do for them. Surely the law will not prohibit the parties from contracting for a valuable consideration, to do what it will compel by legal process. It is thought that unless the relation of the parties is used to acquire some undue influence, by which the mortgagee unfairly oppresses the mortgagor, or the sale is based on a grossly inadequate consideration, such a transaction will be sustained, for the reason that it is not an unfair sale of the equity of redemption, nor an unreasonable fettering of it within the meaning of the law. The effect of such a transaction is merely to convert it by contract into the statutory right of redemption, in order to save the expenses of foreclosure incident to a suit. It is the spirit of the law to favor the compromise of law suits, whether pending or threatened, upon the soundest principles of public policy. Upon these principles it is thought that such a transaction in relation to a defaulted mortgage is not only a prudent business arrangement, but one that will be looked upon favorably and upheld by courts of equity.<sup>1</sup>

§ 905. **Evasion of equitable rule.**—Any agreement or arrangement which is designed to enable the mortgagee to evade the equitable rule and wrest the property from the mortgagor is invalid and will not bar the right to redeem in the mortgagor, his heirs or assigns.<sup>2</sup> But it has been held that a stipulation in the mortgage limiting the time within which redemption is to be made does not affect the right of redemption itself, and is therefore valid;<sup>3</sup> also that stipulations limiting the time of redemption to the lifetime of the mortgagee as a means of benefiting the mortgagee, by way of settlement, will be upheld.<sup>4</sup>

Ala. 622; s. c. 2 So. Rep. 320; Comer v. Sheehan, 70 Ala. 452; Cooper v. Hornsby, 70 Ala. 62; Ala. Code, 1886, § 1879, *et seq.*

<sup>1</sup> Stoutz v. Rouse, 84 Ala. 809; s. c. 4 So. Rep. 170.

<sup>2</sup> Spurgeon v. Collier, 1 Eden 55;

Newcomb v. Bonham, 1 Freem. Ch. 67; s. c. 1 Vern. 8; Howard v. Harris, 1 Vern. 33.

<sup>3</sup> Storer v. Bounds, 1 Ohio St. 107.

<sup>4</sup> Bonham v. Newcomb, 2 Vent. 364; s. c. 1 Vern. 8.



§ 906. **Payment of additional sum and taking title.**—An arrangement providing that in case of breach of the condition in the mortgage, the mortgagee shall pay a stipulated sum and take the title, is open to the objection that the equity of redemption is improperly cut off without due foreclosure, and for that reason will be set aside by a court<sup>1</sup> of equity.

§ 907. **Sale of equity of redemption to mortgagee.**—While equity will not recognize an agreement entered into at the time of executing the mortgage, whether contained in the same or a separate contemporaneous instrument,<sup>2</sup> to waive or surrender the right in the equity of redemption,<sup>3</sup> yet it will enforce a similar agreement subsequently made, where the transaction is based on a valuable consideration and fairly conducted,<sup>4</sup> and unmixed with any advantage

<sup>1</sup> See: *Toomes v. Couset*, 3 Atk. 267; *East India Co. v. Atkyns*, 1 Comy. 347, 349; *Vernon v. Bethell*, 2 Eden 110; *Willett v. Winnell*, 1 Vern. 488.

<sup>2</sup> In *Michigan*, in the case of *Batty v. Snook*, 5 Mich. 231, the court say: "To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for the purpose two instruments, instead of one, to effect the object."

<sup>3</sup> See: *Ante*, §§ 897, 898.

<sup>4</sup> *Stoutz v. Rouse*, 84 Ala. 309; s. c. 4 So. Rep. 170; *McKinstry v. Conly*, 12 Ala. 678; *Green v. Butler*, 26 Cal. 595; *McMillan v. Richards*, 9 Cal. 365; s. c. 70 Am. Dec. 655; *Mills v. Mills*, 26 Conn. 213; *Wynkoop v. Cowing*, 21 Ill. 570; *Vernum v. Babcock*, 3 Iowa 194; *Linell v. Lyford*, 72 Me. 280; *Baughner v. Merriyman*, 32 Md. 185; *Daugherty v. McColgan*, 6 Gill. & J. (Md.) 275; *Hicks v. Hicks*, 5 Gill & J. (Md.) 75; *Schickel v. Hopkins*, 2 Md. Ch. 89; *Falis v. Conway Ins. Co.*, 89 Mass.

(7 Allen) 46; *Trull v. Skinner*, 34 Mass. (17 Pick.) 213; *Harrison v. Trustees Phillips Academy*, 12 Mass. 456; *Batty v. Snook*, 5 Mich. 231; *McNees v. Swaney*, 50 Mo. 388; *Odell v. Montross*, 68 N. Y. 499; revg. 6 Hun (N. Y.) 155; *Remsen v. Hay*, 2 Ed. Ch. (N. Y.) 535; *Holridge v. Gillespie*, 2 John Ch. (N. Y.) 34; *Hyndman v. Hyndman*, 19 Vt. 9; s. c. 46 Am. Dec. 171; *Rogan v. Walker*, 1 Wis. 527; *Peugh v. Davis*, 96 U. S. 332; bk. 24 L. ed. 775; *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; s. c. *sub nom*, *Alexander v. Rodriguez*, bk. 20 L. ed. 406; *Russell v. Southard*, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927; *Morris v. Nixon*, 42 U. S. (1 How.) 119, 126; bk. 11 L. ed. 69, 72.

An absolute deed of land was given in *Trull v. Skinner*, 34 Mass. (17 Pick.) 213, accompanied by a simultaneous instrument not recorded, operating by way of defeasance. The parties afterwards, by mutual stipulations, agreed that the defeasance should be surrendered and cancelled

taken by the mortgagee of the necessitous circumstances of the mortgagor; otherwise equity will hold the parties to the original relation of debtor and creditor.<sup>1</sup> But it is said that while the mortgagor may thus sell the equity of redemption to the mortgagee, he is entitled to every favorable consideration on account of the unequal relations of the parties, and that the sale, though not void, is viewed suspiciously.<sup>2</sup>

The supreme court of the United States, in the case of *Peugh v. Davis*,<sup>3</sup> say: "A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized so as to prevent any oppression of the debtor. Especially is this necessary when the creditor has shown himself ready and skillful to take advantage of the necessities of the borrower. Without citing the authorities, it may be stated as conclusions from them that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing in terms a transfer of the mortgagor interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding."

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without intent to vest the estate unconditionally in the grantee. The court held that this was a valid transaction, if conducted with fairness between all parties and rights of third persons had not intervened. See: *McNees v. Swaney*, 50 Mo. 388.

<sup>1</sup> *Stoutz v. Rouse*, 84 Ala. 309; s. c. 4 So. Rep. 170; *McKinstry v. Conly*, 12 Ala. 678; *Mills v. Mills*, 26 Conn. 213; *Wynkoop v. Cowing*, 21 Ill. 570; *Linnell v. Lyford*, 72

Me. 280; *Baugh v. Merryman*, 32 Md. 185; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *Schickel v. Hopkins*, 2 Md. Ch. 89; *Remsen v. Hay*, 2 Edw. Ch. (N. Y.) 535; *Rogan v. Walker*, 1 Wis. 527; *Russell v. Southard*, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927; *Morris v. Nixon*, 42 U.S. (1 How.) 119, 126; bk. 11 L. ed. 69, 72.

<sup>2</sup> *Hyndman v. Hyndman*, 19 Vt. 9; s. c. 46 Am. Dec. 171.

<sup>3</sup> 96 U. S. 332; bk. 24 L. ed. 775.

§ 908. **Same—Setting aside sale.**—A sale or release of the equity of redemption to the mortgagee by the mortgagor is looked upon with disfavor by courts of equity, and will be avoided for fraud of any kind, either actual or constructive, or for any advantage taken in the transaction by the mortgagee of the mortgagor's necessitous circumstances.<sup>1</sup> The mortgagor is entitled to every favorable consideration on account of the unequal relations of the parties, and the sale, though not void, is viewed suspiciously.<sup>2</sup> It must distinctly appear that the transaction is in all respects fair, and based upon an adequate consideration.<sup>3</sup>

In the case of *Hicks v. Hicks*,<sup>4</sup> the relation of a mortgagor and mortgagee existed, and the latter purchased from the former his equity of redemption worth \$2,000 or \$2,500 for \$1,600. The court held it not such an inadequacy of price as to induce a court of equity to impeach the sale as unfair, particularly in the absence of corroborative proof of fraud, undue advantage, or the like.

But it is said by the supreme court of Wisconsin in the case of *Moeller v. Moore*,<sup>5</sup> that a conveyance by a mortgagor to the mortgagee of a valuable equity of redemption, upon no consideration other than the assumption of a mortgage which is a first lien upon land worth several times its amount, will be set aside and the mortgagor allowed to redeem, even if the proof is insufficient to show that the conveyance was intended only as a mortgage.

§ 909. **Same—Rule governing courts.**—The rule governing courts of equity when considering the right to redeem by the mortgagor, who has conveyed to the mortgagee the

<sup>1</sup> See authorities cited in last four sections.

<sup>2</sup> *Hyndman v. Hyndman*, s. c. 46 Am. Dec. 171.

<sup>3</sup> *Patterson v. Yeaton*, 47 Me. 306; *Hicks v. Hicks*, 5 Gil. & J. (Md.) 75; *Trull v. Skinner*, 34 Mass. (17 Pick.) 213; *Odell v. Montrass*, 68 N. Y. 499, rev'g 6 Hun (N. Y.) 155; *Remsen v. Hay*, 2 Edw. Ch. (N. Y.) 535;

*Holridge v. Gillespie*, 2 John. Ch. (N. Y.) 30, 34; *Barnes v. Brown*, 71 N. C. 507; *Villa v. Rodriguez*, 79 U. S. (17 Wall.) 323; s. c. *sub nom* *Alexander v. Rodriguez*, bk. 20. L. ed. 406; *Ford v. Olden*, L. R. 3 Eq. Cas. 461.

<sup>4</sup> 5 Gil. & J. (Md.) 75.

<sup>5</sup> 30 Wis. 434; s. c. 5 N. W. Rep. 396.

equity of redemption, is like that which governs a sale by the *cestui que trust* to his trustee.<sup>1</sup> To give validity to a sale of the equity of redemption by the mortgagor to the mortgagee, the conduct of the mortgagee must be, in all things, fair and frank, and he must pay fair value. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him.<sup>2</sup> He must take no advantage of the fears or poverty of the other party. That the mortgagor knowingly surrendered and never intended to reclaim the property is of no consequence, if there is vice in the transaction.<sup>3</sup>

§ 910. Merger of mortgage in equity of redemption.—The general rule at law is that when a greater and a less estate meet in the same person, without any intermediate estate, the less estate is at once merged in the greater.<sup>4</sup> This rule of law is inflexible. The doctrine of merger springs from the fact that when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seized in fee simple; but if there is an outstanding intervening title the foundation of the merger does not exist as a matter of law.<sup>5</sup>

Equity does not favor the doctrine of merger; and where two or more rights or estates are united in one person, equity will keep them distinct, where from the intention of the party, either express or implied, he wishes them to be so kept.<sup>6</sup> Consequently, whether the mortgage, on becoming vested in the same person with the equity of redemption, is merged or continues to be a charge, depends upon the intention, actual or presumed, of the person in whom the in-

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<sup>1</sup> *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; s. c. *sub nom* *Aexander v. Rodriguez*, bk. 20, L. ed. 406.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *James v. Morey*, 2 Cow. (N. Y.) 246; s. c. 14 Am. Dec. 475.

<sup>5</sup> *Stanton v. Thompson*, 49 N. H. 272. See: *Coates v. Cheever*, 1 Cow. (N. Y.) 460.

<sup>6</sup> *James v. Morey*, 2 Cow. (N. Y.) 246; s. c. 14 Am. Dec. 475.

terests are united; and this person will be presumed to intend that which is most to his advantage.<sup>1</sup> Hence, where the equity of redemption is

<sup>1</sup> *Edgerton v. Young*, 46 Ill. 464; *Lyon v. Ilvain*, 24 Iowa 9; *Davis v. Pierce*, 10 Me. 376; *Freeman v. Paul*, 3 Me. (3 Greenl.) 260; s. c. 14 Am. Dec. 237; *Hunt v. Hunt*, 31 Mass. (14 Pick.) 374; s. c. 25 Am. Dec. 400; *Hinchman v. Emans*, 1 N. J. Eq. (1 Saxt.) 100; *Payne v. Wilson*, 74 N. Y. 354; *Mason v. Lord*, 40 N. Y. 476. 489; *Bascom v. Smith*, 34 N. Y. 320, 329; *Champney v. Coope*, 32 N. Y. 542, 548; *Thompson v. Van Vechten*, 27 N. Y. 579; s. c. 5 Abb. (N. Y.) Pr. 464; 6 Bosw. (N. Y.) 465; *Michaels v. Townsend*, 18 N. Y. 575, 582; *Clift v. White*, 12 N. Y. 519, 525, 535; s. c. 15 Barb. 75; *Spencer v. Ayrault*, 10 N. Y. 202, 204; *Warner v. Blakeman*, 36 Barb. (N. Y.) 524; *Casey v. Buttolph*, 12 Barb. (N. Y.) 639; *Reid v. Latson*, 15 Barb. (N. Y.) 14; *Averill v. Wilson*, 4 Barb. (N. Y.) 191; *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 516; *James v. Morey*, 2 Cow. (N. Y.) 246; s. c. 14 Am. Dec. 475; *Day v. Mooney*, 4 Hun (N. Y.) 134; *Starr v. Ellis*, 6 John Ch. (N. Y.) 393; *Hitchcock v. Harrington*, 6 John. (N. Y.) 290; s. c. 5 Am. Dec. 229; *Gardner v. Astor*, 3 John. Ch. (N. Y.) 53; s. c. 8 Am. Dec. 465; *Skeel v. Sparker*, 8 Paige Ch. (N. Y.) 186; *Russell v. Austin*, 1 Paige Ch. (N. Y.) 96; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 115; *Roberts v. Jackson*, 1 Wend. (N. Y.) 484; *Patten v. Bond*, 60 L. T. 583, 585; *Thomas v. Kemish*, 2 Vern. 348; *Forbes v. Moffatt*, 18 Ves. 385, 390; s. c. 11 Rev. Rep. 222; 4 Kent Com. 99-104.

Foundation of equitable doctrine—*Forbes v. Moffatt*.—The

equitable doctrine announced by the American courts rests largely upon the case of *Forbes v. Moffatt*, 18 Ves. 385; s. c. 11 Rev. Rep. 822, decided in 1811, in which Sir William Grant, master of the roles, held that a mortgage is not merged by union with the fee, where such merger would be prejudicial to the owner. In this case the facts were as follows: "John Moffatt held a mortgage of certain estates to secure the payment of thirteen thousand pounds. Afterwards, the mortgagor died, having by his will devised all his property, real and personal, to the said John Moffatt, the mortgagee; and the question was, whether the mortgage was extinguished or sunk in the devise. Sir William Grant, the master of the roles, in delivering his opinion, lays down certain principles, regulating in all questions of such a nature. He observes: 'It is very clear that a person becoming entitled to an estate subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot. The owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make is not whether he will take the estate or the charge; but whether taking the estate he means the charge to sink in



purchased by the mortgagee a merger does not take place in those cases where it is to the interest of the mortgagee to keep the mortgage alive, and this can be done without prejudice to the rights of the mortgagor, or of third persons.<sup>1</sup> And where there is an assignment of a mortgage in process of foreclosure to the holder of the equity of redemption, and he goes on and prosecutes the foreclosure suit to judgment and sells the premises, it is presumed from such act that he does not intend to have the equity of redemption merge in the legal estate, and therefore a merger will not take place.<sup>2</sup> In those cases where the purchase of a senior mortgage by the purchaser of the equity of redemption, to protect his title, this does not create a merger so as to extinguish the lien of the mortgage, and on a foreclosure by the latter the first mortgage must be first paid.<sup>3</sup>

§ 911. Redemption money—Lien for.—The supreme court of Michigan, in the case of *Powers v. Golden Lumber*

it or continue distinct from it.' Whether no intention is expressed by words or actions on the part of the mortgagee, as to the manner in which he holds the estate after acquiring the whole title, recourse is to be had to presumptive intention. On this point the master of the roles proceeds and says: 'With regard to presumptive intention, it was evidently most advantageous for John Moffatt that this mortgage should be kept on foot, for otherwise, he would have given priority to the other mortgage, and all the debts of his brother (the mortgagor). The reasonable presumption, therefore, is that he would choose to keep the mortgage on foot. When no intention is expressed, or the party is incapable of expressing any, I apprehend the court considers what is most advantageous to him. Upon that principle it was holden in the case of *Thomas v. Kemish*, 2 Vern. 348, that the charge should not sink; as

that was for the advantage of the infant.' He further observes: 'Upon looking into all the cases in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interests had united, whether the charge should or should not subsist; and in that case I have already said it sinks.'"

<sup>1</sup> *Vannice v. Bergen*, 16 Iowa 555; s. c. 85 Am. Dec. 531. See: *McClaskey v. O'Brien*, 16 W. Va. 847; *Hoffman v. Wilhelm*, 68 Iowa 514; s. c. 27 N. W. Rep. 483; *Denham v. Snakey*, 38 Iowa 271; *Millspaugh v. McBride*, 7 Paige Ch. (N. Y.) 509; s. c. 34 Am. Dec. 360; *Duncan v. Drury*, 9 Pa. St. 332; s. c. 49 Am. Dec. 565.

<sup>2</sup> *Knowles v. Lawton*, 18 Ga. 476; s. c. 63 Am. Dec. 290.

<sup>3</sup> *Millspaugh v. McBride*, 7 Paige Ch. (N. Y.) 509; s. c. 34 Am. Dec. 360.

Company,<sup>1</sup> say that a lien for redemption money is an independent equity, and not merely appurtenant to the mortgage held by a mortgagee who has redeemed, so that proceedings to enforce the lien may be taken before such mortgage matures, and the discharge of the mortgage does not cut off the lien.

§ 912. On sale under a power.—A sale of mortgaged lands under a power contained in the mortgage cuts off the equity of redemption in the absence of any statutory provision showing the right.<sup>2</sup> For this reason a court of equity will examine with the closest scrutiny such a sale; and where the rights of third persons have not intervened, redemption conditioned upon the full payment of all that is due the holder of the indebtedness will be allowed in case of any unfairness on the part of the trustee resulting in injury to the debtor.<sup>3</sup> And it is said in *Lovelace v. Hutchinson*<sup>4</sup> that conveyances of the mortgaged premises by the mortgagee do not stand in the way of redemption by the mortgagor or his privies from a sale under a power in the mortgage, where such conveyances are without any consideration and are fraudulent as against the mortgagor and those claiming under him.

It is said by the supreme court of Missouri, in the case of *Godfrey v. Stock*,<sup>5</sup> that the owner of mortgaged premises sold under a power contained in a deed of trust, who gives notice on the day of sale to the trustee and the purchaser, who is an assignee of the *cestui que trust*, of his intention to redeem, but fails to make application to the court for leave to give security for two days, on account of sickness, does not thereby lose the right to redeem under the Missouri statute,<sup>6</sup> allowing redemption from such sale within a year, upon condition that security be given for interest and

<sup>1</sup> 43 Mich. 468; s. c. 5 N. W. Rep. 656.

<sup>2</sup> *Powers v. Andrews*, 84 Ala. 289; s. c. 4 So. Rep. 263.

<sup>3</sup> *Williamson v. Stone*, 128 Ill. 129; s. c. 22 N. E. Rep. 1005, aff'g 27 Ill. App. 214.

<sup>4</sup> 17 So. Rep. (Ala.) 623.

<sup>5</sup> 116 Mo. 403; s. c. 22 S. W. Rep. 733.

<sup>6</sup> Mo. Rev. Stat., 1889, §§ 7079, 7080.

damages and waste permitted by the owner, on the ground that he has not used diligence.

§ 913. **Extinguishment of right of redemption.**—We have already seen that the right of redemption, being a reciprocal right,<sup>1</sup> is an incident of every mortgage<sup>2</sup> which can not be waived<sup>3</sup> or surrendered,<sup>4</sup> except by the free act of the mortgagor, in a proper manner, for an adequate consideration,<sup>5</sup> evidenced by an instrument in writing,<sup>6</sup> or by judgment of a court of competent jurisdiction, or by statutory proceedings out of court which are the equivalent of an equitable action,<sup>7</sup> or by the neglect of the mortgagor to assert his rights until after the running of the statute of limitations,<sup>8</sup> or by conduct amounting to an estoppel *in pais*.<sup>9</sup> But in all cases where the mortgagor's equity is once extinguished it should remain absolutely blotted out forever.<sup>10</sup>

§ 914. **Same—By action and sale.**—The general rule is that a person who has taken an absolute deed as security for a loan must file a bill in order to cut off the debtor's right to redeem, and is obliged to accept the amount due and reconvey the property, when such amount is properly tendered at any time before the right to redeem is cut off.<sup>11</sup>

The supreme court of Michigan, in the case of *Humphrey v. Hurd*,<sup>12</sup> say that the mere assumption of a mortgagee, evidenced by his giving a deed, that he has title in fee, cannot bar the equity of redemption; nor can an occasional occupation under such deed, or any occupation short of a continuous and notorious one, adverse to the right to redeem, give it that effect.

<sup>1</sup> See: *Ante*, § 883.

<sup>2</sup> See: *Ante*, § 839.

<sup>3</sup> See: *Ante*, § 896.

<sup>4</sup> See: *Ante*, § 897.

<sup>5</sup> See: *Ante*, § 898, *et seq.*; *O'Dell v. Mentoss*, 68 N. Y. 499, reversing 6 Hun (N. Y.) 155.

<sup>6</sup> See: *Ante*, § 899.

<sup>7</sup> See: *Post*, § 914.

<sup>8</sup> See: *Post*, c.

<sup>9</sup> Estoppel in pais. See: *Post*, § 921.

<sup>10</sup> *Chapin v. Wright*, 41 N. J. Eq. 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 59; *Bates v. Conrow*, 11 N. J. Eq. (3 Stock.) 137; 2 Co. Litt. (19th ed.) p. 302, § 532.

<sup>11</sup> *McSorley v. Hughes*, 58 Hun (N. Y.) 360; s. c. 34 N. Y. S. R. 945; 12 N. Y. Supp. 179.

<sup>12</sup> 29 Mich. 44.

In those cases where the original transactions between a mortgagor and mortgagee was not in form a mortgage, but an absolute deed, with a bond to reconvey on the payment of the money at a specified time, still, it is not essential to the proper extinguishment of the right of redemption, by an arrangement between the parties themselves, that it should be done by an instrument which will operate as a technical conveyance of the mortgagor's estate in the land. If such transactions have occurred between the parties as render it inequitable that the grantor should be permitted to redeem, that, of itself, without a technical release, will operate as a cancellation of the instrument of defeasance, and give to the deed the effect of an original, absolute conveyance as between the parties.<sup>1</sup> But where a mortgagee takes possession, not simply under his mortgage, but under a valid sheriff's deed on execution against the mortgagor for another than the mortgage debt, there can be no redemption.<sup>2</sup>

In those cases where a power is subsequently given to the trustees in a trust deed empowering them to foreclose, and authorizing the mortgagor to sell the lands and substitute the proceeds for reinvestment by the trustees as a sinking fund, and to sell the lands themselves to carry out the trust, authorizes a sale without right of redemption.<sup>3</sup>

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<sup>1</sup> West v. Reed, 55 Ill. 242.

<sup>2</sup> Thompson v. Ellenz, 58 Minn.

<sup>3</sup> Freickencht v. Meyer, 38 N. J. 301; s. c. 59 N. W. Rep. 1023.  
Eq. (77 Stew.) 315. EE

## CHAPTER XXXVIII.

### REDEMPTION—CIRCUMSTANCES AFFECTING.

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| <p>§ 915. Extinguished by foreclosure.</p> <p>916. Failure to make interested person party—Effect.</p> <p>917. Same—Compelling Redemption.</p> <p>918. Agreement between parties.</p> <p>919. Sale of equity of redemption—Effect on rights.</p> <p>920. Payment after breach of contract—Effect.</p> <p>921. Estoppel <i>in pais</i>.</p> <p>922. Conveyance by mortgagee.</p> <p>923. Two or more mortgages on one tract — Redeeming from one.</p> <p>924. Separate mortgages on separate tracts — Redeeming from one.</p> <p>925. Redemption by part owner—Extent of right.</p> <p>926. Same—Remedy on.</p> | <p>§ 927. Statutes regulating redemption.</p> <p>928. Same—Designating a shorter time.</p> <p>929. Same—Filing deed or certificate under.</p> <p>930. Same—Accepting part payment—Effect.</p> <p>931. Same—Mortgagor's possession during—Constitutionality of statute.</p> <p>932. Same—Possession by purchaser during—Accounting.</p> <p>933. Same—After foreclosure—By creditor.</p> <p>934. Same—Same—By junior lienor.</p> <p>935. Same—Same—By assignee of junior lienor.</p> <p>936. Same—Same—Conditions on.</p> |
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§ 915. Extinguished by foreclosure.—The right of a mortgagor and those claiming under him to redeem from the mortgage is extinguished by a foreclosure when properly made.<sup>1</sup> Such a foreclosure of a mortgage bars the right

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<sup>1</sup> Knox v. Armstead, 87 Ala. 511; s. c. 13 Am. St. Rep. 65; 5 L. R. A. 297; 6 So. Rep. 311; Willis v. McIntosh, 1 Ga. Dec. 162; Ballinger v. Bourland, 87 Ill. 513; Werner v. Heintz, 17 Ill. 259; Stoddard v. Forbes, 13 Iowa 296; Lewis v. Smith, 9 N. Y. 502; s. c. 61 Am. Dec. 706; Thompson v. Paris, 63 N. H. 421; s. c. 1 N. Eng. Rep. 235; Bennett v. Austin, 81 N. Y. 308; Beaufort County Lumber Co. v. Dail, 112 N. C. 350; s. c. 17 S. E. Rep. 527, denying re- (1522)

hearing in 111 N. C. 120; s. c. 15 S. E. Rep. 941.

As to when redemption may be made, see full discussion, *Post*, c. XLI.

In the case of Bennett v. Austin, 81 N. Y. 308, the Western Elevating Company, a general association of a trust character, took from the different owners of elevators in Buffalo instruments called leases, giving the association the right of possession and control. By a contemporaneous written



of redemption of the mortgagor and of all persons claiming under him, including minor heirs; and such heirs have no right to redeem on showing want of actual notice, or the failure to have a guardian *ad litem* appointed and notice given to him.<sup>1</sup> A decree against defendant made party to foreclosure suit under general allegation that he claimed some interest in the premises "as subsequent purchaser or

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contract of the Western Elevating Company with the owner of each elevator, the latter was permitted to operate his elevator in the service of the Western Elevating Company at a fixed compensation per bushel, intended to pay for such service and expenses, the profits being divided among the so-called lessors. The firm of B & A, owning two elevators, so leased for a term of three years, assigned their share of the profits to S & Co., the holders of a mortgage thereon, to be applied in liquidation of the debt and of prior incumbrances. A and B, and B's wife, who had a separate interest in the two elevators, conveyed them to C to secure advances made to B & A, he knowing of the arrangement with S & Co. Afterwards C, by setting up the apparent title under his deed, and without the consent of B & A or of S & Co., induced the Western Elevating Company to substitute for the lease a new one from himself as owner of the two elevators, of which he took possession, thenceforth receiving and retaining the dividends. Thereupon S & Co. foreclosed their mortgage, and, by an arrangement with them, C, after judgment, obtained control of the sale and became the purchaser for the amount of the judgment. In an action by B and wife to have the deed to C declared a mortgage, and to redeem, the court held: (1) That C's widow and devisee could not, in

equity, avail herself of the title obtained on foreclosure sale to defeat the plaintiffs' equity of redemption, they having the right to have the dividends set apart for the reduction of the mortgage of S & Co. applied to that purpose; (2) That C, on possessing himself of the dividends, became, *ex maleficio*, constructively a trustee of the fund, and the law imposed on him the duty to apply the dividends to reduce the mortgage. The purchase in his own behalf, taking advantage of his own wrong, did not cut off the right to redeem; (3) That B, having no defense to the mortgage, was not, by not defending against the foreclosure, precluded from contesting the title obtained under it; (4) That B's rights were not affected by the usual clause in the foreclosure decree authorizing any party to the action to become a purchaser; and this, although the facts as to the assignment of the dividends and the subsequent action of C were set forth in the complaint as a foundation of a claim against C for dividends: and (5) That the fact that C was, in his own right, owner of one-third of one of the two elevators, did not alter the case further than merely to reduce the amount he was bound to apply on the mortgage of S & Co.

<sup>1</sup>Thompson v. Paris, 63 N. H. 421; s. c. 1 N. Eng. Rep. 235.

encumbrancer, or otherwise," bars rights and interests in the equity of redemption, but not those which are paramount to the title of both mortgagor and mortgagee.<sup>1</sup>

But the equity of redemption is not extinguished by a decree of foreclosure until the decree is executed by a sale; consequently, one who purchases after the decree and before the sale thereunder, becomes the owner of the right to redeem.<sup>2</sup> In those cases where a power in a mortgage giving the mortgagee the right to purchase as if he were not a party, when exercised without fraud or oppression, deprives the mortgagor of the right to redeem.<sup>3</sup>

The supreme court of North Carolina, in the case of Beaufort County Lumber Company v. Dail,<sup>4</sup> say that the equity of redemption in timber on mortgaged land, conveyed by the mortgagor to the holder by assignment of the mortgage, who makes a verbal agreement that the mortgage shall not embrace the timber; is cut off by foreclosure of the mortgage by a subsequent assignee, as against one to whom the equity of redemption is conveyed after the assignment of the mortgage.

§ 916. Failure to make interested person party—Effect.—The right to redeem from a mortgage is incident to every mortgage,<sup>5</sup> and belongs to the mortgagor and every person claiming under him. This right cannot be extinguished except by due process of law,<sup>6</sup> or the acts or omissions of the party himself.<sup>7</sup> Every person interested in the mortgaged property and entitled to redeem from the mortgage, must be made a party to the proceeding and given an opportunity of exercising his right to redeem, otherwise the proceedings, as to those not made parties, will be a nullity.<sup>8</sup> Thus the supreme court of Iowa have

<sup>1</sup> *Lewes v. Smith*, 9 N. Y. 502; 527, denying re-hearing in 111 N. C. s. c. 61 Am. Dec. 706. 120; s. c. 15 S. E. Rep. 941.

<sup>2</sup> *Willis v. Smith*, 66 Tex. 31.

<sup>5</sup> See: *Ante*, § 389.

<sup>3</sup> *Knox v. Armstead*, 87 Ala. 511; s. c. 13 Am. St. Rep. 65; 5 L. R. A. 297; 6 So. Rep. 311.

<sup>6</sup> See; *Ante*, §§ 913, 914.

<sup>7</sup> See: *Post*, § 921.

<sup>8</sup> *Murdock v. Ford*, 17 Ind. 52; *Ayers v. Adair County*, 61 Iowa 728;

<sup>4</sup> 112 N. C. 350; s. c. 17 S. E. Rep.

held that a purchaser at a tax sale of land mortgaged to the school fund is not cut off from his right to redeem from such mortgage by foreclosure proceedings to which he is not made a party.<sup>1</sup> In those cases where a mortgage has been foreclosed in an action to which a junior lien-holder has not been made a party, the purchaser under the foreclosure may maintain an action requiring the junior lien-holder to exercise his right of redemption, and in default thereof is entitled to a decree cutting off such right of redemption.<sup>2</sup>

§ 917. Same—Compelling redemption.—The court of chancery of New Jersey, in the case of *Parker v. Child*,<sup>3</sup> say that a first mortgagee, on purchasing at his foreclosure sale, may require a second mortgagee, who by oversight was not made a party to the suit, to redeem within a reasonable time or to be foreclosed; and this, not only for the amount of principal and interest due, but also for the purchase-money paid by him over and above such amount, in liquidation of claims prior to the second mortgage, to the rights of the holders of which claims the purchaser had been thereby subrogated.

§ 918. Agreement between parties.—The parties to

s. c. 17 N. W. Rep. 161; *Shaw v. Heisey*, 48 Iowa 468; *Johnson v. Harmon*, 19 Iowa 56; *Bates v. Rud-dick*, 2 Iowa 423; *Barker v. Child*, 25 N. J. Eq. (10 C. E. Gr.) 41; *Miner v. Beekman*, 50 N. Y. 337; s. c. 14 Abb. (N. Y.) Pr. N. S. 1; 42 How (N. Y.) Pr. 33; *Sellwood v. Gray*, 11 Oreg. 534; s. c. 5 Pac. Rep. 196; *Noyes v. Hall*, 97 U. S. 34; bk. 24 L. ed. 909.

In Illinois actual and open possession of land is equivalent to registry.—Under this statute the case of *Noyes v. Hall*, 97 U. S. 34; bk. 24 L. ed. 909, arose. In this case A, the owner in fee of certain land which was mortgaged to B, contracted

in writing to sell and convey it to C, who thereupon entered, and thereafter remained in open possession. The agreement was subsequently carried out, and a deed was given to C; but, before the deed was given B's mortgage was foreclosed by suit, and the premises were sold in accordance with the decree. The court held that C, not having been made a party to the foreclosure suit, was not bound by it, and was, notwithstanding the decree and sale, entitled to redeem.

<sup>1</sup> *Ayers v. Adair County*, 61 Iowa 728; s. c. 17 N. W. Rep. 161.

<sup>2</sup> *Shaw v. Heisey*, 48 Iowa 468.

<sup>3</sup> 25 N. J. Eq. (10 C. E. Gr.) 41.

a mortgage have the same right and power to contract respecting the mortgaged bonds as they would have if they did not sustain the relation of mortgagor and mortgagee; the only difference is that the terms of the agreement and the means or influences used to bring it about will be much more rigidly scrutinized to prevent fraud and oppression.<sup>1</sup> Thus it has been held by the supreme court of Illinois, that an agreement by which, in consideration of quitclaim deeds of the mortgaged premises to the mortgagee, he gives an extension of time for a portion of the debt, and a right to redeem a certain part of them upon payment of a certain portion of the debt, may be enforced.<sup>2</sup> But the acceptance of a quitclaim or other deed of the grantor's right to redeem an estate under mortgage, does not impose upon the grantee an obligation to pay the mortgage debt, and redeem the estate; and he may afterwards become the assignee of the mortgage, without thereby discharging it.<sup>3</sup>

The court of chancery of New Jersey, in the case of *Snyder v. Greaves*,<sup>4</sup> say that a mortgagee who, upon the foreclosure of his mortgage, agrees with the mortgagor to purchase the property at the sale and convey it to the mortgagor, continues to hold the title after such purchase, as security only for the payment of the amount due upon his decree, and if he fails to convey, the mortgagor may redeem.<sup>5</sup>

§ 919. Sale of equity of redemption — Effect on Rights.—The voluntary sale by the mortgagor of his

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<sup>1</sup> See: *Ante*, §§ 898, 904.

<sup>2</sup> *Union Mutual Life Insurance Co. v. Kirchoff*, 133 Ill. 368; 27 N. E. 91, Aff'g 33 Ill. App. 607.

<sup>3</sup> *Rogers v. Meyers*, 68 Ill. 92; *Randall v. Bradley*, 65 Me. 43; *Adams v. Hudson, County Bank*, 10 N. J. Eq. (2 Stock.) 535; s. c. 64 Am. Dec. 469.

<sup>4</sup> 21 Atl. Rep. (1891) 291.

<sup>5</sup> In the case of *Hensley v. Whiffin*, 58 Iowa 426, A, a junior mortgagee,

after foreclosure of the first mortgage, made an agreement with B, by which B was paid \$2,500 to buy the certificate of sale, was to convey a certain portion of the land to A upon payment of \$1,800, and the balance, if A should want it, for \$1,200; if the owner of the equity redeemed, B was to have all the redemption money. The court held that A had no right to redeem from B by paying \$2,500.

equity of redemption extinguishes the right of himself and those claiming under him to redeem the mortgaged premises from the lien of the mortgage. The same is true where there is a sale on execution for other indebtedness.<sup>1</sup> Such a sale deprives the holder of the mortgage indebtedness of his right of election of remedies, between suit on the notes or foreclosure.<sup>2</sup> The supreme court of Illinois, in the case of *Rogers v. Meyers*,<sup>3</sup> say that the purchase on execution of the mortgagor's equity of redemption by a stranger to the mortgage, for other indebtedness, will not affect the right of the mortgagee or his assignee to resort to any or all the remedies he had before. Such a purchase will not render the purchaser a debtor of the mortgagee or his assignee, and release the mortgagor, either at law or in equity. Therefore, the mortgagor has no right in equity to compel such purchaser to redeem from his mortgage or lose his debt. The mortgage creditor may do so, if he chooses, by foreclosure.

In a case where a redemption of land, sold under a decree of foreclosure, was made after the death of the debtor by a judgment creditor, whose execution was void, and who had no right to levy and sell under the same, and the redemption money was accepted and acted upon as valid by the prior creditor, the court held that the acceptance operated to extinguish the prior sale, the same as if the redemption had been properly made, and re-invested the heirs-at-law of the deceased debtor with the title to the land, and that they were not precluded from contesting the title claimed by such redeeming creditor, by sale under his execution.<sup>4</sup>

§ 920. **Payment after breach of contract—Effect.**—The general rule is that where the mortgagor pays the debt after the law day has expired, he will not be entitled

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<sup>1</sup> An equity of redemption cannot be sold upon two or more executions jointly in favor of different creditors. *Chapman v. Androscoggin R. R. Co.*, 54 Me. 160.

<sup>2</sup> *Rogers v. Meyers*, 68 Ill. 92.

<sup>3</sup> 168 Ill. 92.

<sup>4</sup> *Clingman v. Hopkie*, 78 Ill. 152.



to maintain an action at law against the mortgagee for the possession,<sup>1</sup> because such payment of the mortgage, after forfeiture, does not divest the mortgagee of his legal estate;<sup>2</sup> it simply gives to the mortgagor a right of action in equity to compel a reconveyance.<sup>3</sup> But receiving in whole or in part the mortgage debt included in a decree of foreclosure after it has become absolute, will let in the mortgagor to redeem, because this will constitute a waiver on the part of the mortgagee of existing forfeitures.<sup>4</sup>

§ 921. *Estoppel in pais.*—A mortgagor, and those claiming under him, may be estopped by their own acts from exercising the right of redemption from a person who has purchased the land on the strength of their acts or words. Thus, the supreme judicial court of Massachusetts, in the case of *Fay v. Valentine*,<sup>5</sup> say that a subsequent mortgagee will be estopped to redeem the premises as against a prior mortgagee's assignee, whom the subsequent mortgagee induced to purchase the mortgaged premises on the assurance that he would never redeem them. In discussing the question the court say: "In the case of *Mocatta v. Murgatroyd*,<sup>6</sup> Lord Cowper decided that a prior mortgage should be postponed to a subsequent one, merely on the proof that the prior mortgagee was a witness to the subsequent mortgage." So far as this goes to impute

<sup>1</sup> *Doton v. Russell*, 17 Conn. 136, 154; *Smith v. Vincent*, 15 Conn. 1; s. c. 38 Am. Dec. 52.

<sup>2</sup> *Cross v. Robinson*, 21 Conn. 387.

<sup>3</sup> *Dudley v. Caldwell*, 19 Conn. 228; *Smith v. Vincent*, 15 Conn. 1; s. c. 38 Am. Dec. 52.

<sup>4</sup> *Gleason v. Whitney*, 51 Vt. 552. See: *Post*, §930.

As to redemption after foreclosure, See: *Post*, c. XLI.

<sup>5</sup> 29 Mass. (12 Pick.) 40; s. c. 22 Am. Dec. 397.

<sup>6</sup> 1 Pr. Wms. 394.

<sup>7</sup> In the case of *Hunsden v. Cheyney*, 2 Vern. 150, a mother who, being absolute owner of a term, was present

at a treaty of marriage of her son, and heard him declare that the term was to come to him on her death, and did not disclose her true interest, was compelled to make good the settlement, and to settle the revision accordingly after her death.

In the case of *Hanning v. Ferres*, 1 Eq. Cas. Abr. 357, the facts were, that the first son of a tenant for life who was entitled to a remainder in tail on the death of his father, and who knew that the estate was entailed, nevertheless encouraged a person to take a lease from the father for thirty years, and to lay out considerable sums of money in new buildings and improve-

notice to a witness of the contents of a deed merely from his attestation, it must be considered as very properly overruled by Lord Hardwick in the case of *Welford v. Beezely*,<sup>1</sup> and again by Lord Thurlow in *Beckett v. Cordley*,<sup>2</sup> but in none of these cases was it doubted, that if a mortgagee has actual knowledge of the contents of a subsequent mortgage, and nevertheless stands by and witnesses the execution of the second mortgage without disclosing his prior incumbrance, this would be such a fraud in him as would authorize a court of equity to postpone such prior incumbrance, so as to let in the subsequent mortgage. And the supreme court of Vermont, in the case of *Wright v. Whitehead*,<sup>3</sup> say that a mortgagor

ments, in order to reap the advantage thereof if he should survive his father. It was decided that this was such a fraud as ought to be discountenanced in a court of equity; and it was accordingly decreed that the lessee should not be disturbed for the residue of the term that remained unexpired after the father's death.

In the case of *Hobbs v. Norton*, 1 Vern. 136, it appeared that the defendant was issue in tail under a settlement, and that he encouraged the plaintiff to purchase an annuity of the younger son given by the father's will, though it did not appear that the defendant had any notice of the settlement at the time when he encouraged the plaintiff to proceed in the purchase; yet it was decreed that the annuity should be confirmed to the plaintiff, merely on the encouragement given.

In *Raw v. Pote*, 2 Vern. 239; s. c. Prec. Ch. 35, a widow, who had a jointure settled on her for life by her husband, was relieved against an entail fraudulently concealed and then set up against her by the defendant, who was privy to the entail, and who

engrossed the jointure deed in her favor.

In *Peter v. Russell*, 2 Vern. 726, it was decided, that if a mortgagee of a leasehold estate lends the original lease to the mortgagor for the purpose of enabling him to take up more money, which is accordingly done, and he executes a second mortgage, the first mortgage should be postponed to the second, it being considered that the first mortgagee was accessory to the fraud. Otherwise, if he was not privy to the subsequent loan, but innocently lent the lease to the mortgagor.

Where a man having a title and knows it, stands by, and either encourages another to purchase or does not disclose his title, he will not be allowed in a court of equity to set up his claim against the purchaser. *Savage v. Foster*, 9 Mod. 35; *Niven v. Belknap*, 2 John (N. Y.) 573; *Evans v. Bicknell*, 6 Ves. 190; *Bac. Abr. Fraud. B.* A similar principle is laid down in *Foster v. Briggs*, 3 Mass. 313.

<sup>1</sup> 1 Ves. Sr. 6.

<sup>2</sup> 1 Bro. C. C. 357.

<sup>3</sup> 14 Vt. 263.

who has joined with the mortgagee in selling the mortgaged premises at public auction, and receives the purchase money from one who bought in good faith, and has made valuable improvements, will be estopped by his acts from exercising the right of redemption.

§ 922. **Conveyance by mortgagee**—The general rule is that a purchaser of mortgaged premises from a mortgagee, pending a suit to redeem, will hold subject to the equities of the parties seeking the redemption.<sup>1</sup> And for this reason it is thought that the conveyance of mortgaged premises by the mortgagee do not stand in the way of redemption by the mortgagor or his privies from a sale to the mortgagee under a power in the mortgage, where such conveyances are without any consideration and are fraudulent as against the mortgagor or such privies.<sup>2</sup> The supreme judicial court of Maine, in the case of *Linnell v. Lyford*,<sup>3</sup> say that where the equity of redemption is apparently destroyed by the mortgagee, by his conveying an indefeasible title to the premises to a *bona fide* purchaser, a court of equity will treat such mortgagee as a constructive trustee for the balance in his hands after deducting from the price for which the land was sold the amount for which the defendant held it as security.

§ 923 **Two or more mortgages on one tract—Redeeming from one.**—In those cases where two or more mortgages are give upon one tract of land to secure the same debt as a part of one and the same transaction, the mortgagor has no right to separate the transaction, and will be required to redeem from both mortgages.<sup>4</sup> And where one purchases land subject to two mortgages, each on an undivided half of the estate, agreeing as part of the considera-

<sup>1</sup> *Roberts v. Fleming*, 53 Ill. 196.

<sup>2</sup> *Lovell v. Hutchinson* (Ala. 1895), 17 So. 623.

<sup>3</sup> 72 Me. 280.

<sup>4</sup> In *Stanchfield v. Milliken*, 71 Me. 567, certain mill fixtures, which were afterwards incorporated into the real estate, were mortgaged as per-

sonal property to secure the same debt, which deeds of the land were taken to secure. The court said the complainant could redeem from the whole or none; he had no right to separate the transaction.

*Stanchfield v. Milliken*, 71 Me. 567; *Wells v. Tucker*, 57 Vt. 223.

tion to pay these mortgages, he cannot maintain a bill to redeem one of them so as to hold an undivided half of the land free, without redeeming both.<sup>1</sup>

But in those cases where the same person holds as assignee two mortgages of real estate, the purchaser of the equity of redemption may maintain a bill to redeem from only one of them; nor will the expiration of the statutory term of foreclosure upon the other mortgage prevent a decree in his favor as to the mortgage he seeks to redeem.

§ 924. **Separate mortgages on separate tracts—Redeeming from one.**—The general rule is that where several mortgages of different estates by the same mortgagor have been given to or become united in one person, and the equity of redemption is afterwards conveyed to different individuals by the mortgagor, or levied upon and sold under execution, no purchaser can redeem his estate without redeeming all the mortgages, no matter whether he purchased before or after the union in the plaintiff, or whether he did or did not have notice of such mortgages. In such a case the first purchaser of part of the estates in point of time has the first right to redeem from all the mortgages, and, in case of his default, the subsequent purchasers have successively rights to redeem.<sup>3</sup> In a case, however, where A advanced money to B to redeem certain land, and took a mortgage on it as security, together with a mortgage on other land

<sup>1</sup> Wells v. Tucker, 57 Vt. 223.

<sup>2</sup> Milliken v. Bailey, 61 Me. 316.

<sup>3</sup> Franklin v. Gorham, 2 Day (Conn.) 142; s. c. 2 Am. Dec. 86; Beevar v. Luck, L. R. 4 Eq. 537.

In the case of Franklin v. Gorham, *supra*, a mortgagor, to secure a debt due the mortgagee, mortgaged to him two pieces of land by separate deeds; a creditor of the mortgagor levied an execution on the latter's right in one of the pieces; it was held that the creditor was entitled to redeem both, by paying the whole mortgage debt; but could not redeem the piece set off

to him on execution, by paying such proportion of the whole mortgaged premises.

The English rule is thought to be different. In the recent case of Minter v. Carr, (C. A.), 1894, 3 Ch. 498, it is said the holder of first mortgages on two properties belonging to the same mortgagor cannot consolidate them so as to prevent a purchaser of one of the properties under a second mortgage from redeeming it alone, where the first mortgages were not united in the same ownership until after the giving of the second mortgage.

which was found to be incumbered with liens, and as an indemnity against such liens, B allowed A to hold a third piece of land, which A already held in his own name, but had purchased with B's money; the court held that B might redeem this third lot by payment of the liens only, and that said lot was not liable generally for all of B's indebtedness.<sup>1</sup>

§ 925. Redemption by part owner—Extent of right.—The rule laid down in the last two preceding sections which requires that the whole of the mortgage debt or debts, be paid on redemption, is for the protection of the mortgagee. He may waive his right to enforce redemption for the whole amount and accept a proportionate amount of the mortgage debt or debts from any one entitled to redeem, and by his voluntary release may discharge his lien from any portion of the mortgaged premises without jeopardizing his lien for the balance, by deducting from his claims the amount which, under the special circumstances, is just and equitable.<sup>2</sup> In those cases where the mortgagee has equities which require for their full protection that he shall resist redemption from any portion of the estate, the balance of the estate may be compelled to contribute its equitable share; or the mortgagee may defeat the attempt to redeem at his election. Thus where the mortgagee by grant or estoppel holds an interest in the equity of redemption; or where several persons are entitled to redeem, but some are barred by the statute of limitations, the owners of the remaining equity, or the persons whose right is not barred, may

<sup>1</sup> Hardin v. Eames, 5 Ill. App. 153.

<sup>2</sup> See: Birnie v. Nain, 29 Ark. 591; Meacham v. Steel, 93 Ill. 135; Hawke v. Snyder, 86 Ill. 197; Stewart v. McMahan, 94 Ind. 389; Wolf v. Smith, 36 Iowa 454; Douglas v. Bishop, 27 Iowa 214; Gibson v. McCormick, 10 Gill & J. (Md.) 65; Bank v. Thayer, 136 Mass. 459; Clark v. Fountain, 135 Mass. 464; Wing v. Hayford, 124 Mass. 249; Draper v. Mann, 117 Mass. 439; Parkham v. Welch, 36

Mass. (19 Pick.) 231; Benton v. Nicoll, 24 Minn. 221; Hill v. Howell, 3 N. J. Eq. (10 Stew.) 25; Logan Assoc. v. Beaghen, 21 N. J. Eq. 12 C. E. Gr. 98; Mount v. Potts, 23 N. J. Eq. (8 C. E. Gr.) 188; Trustees of Union College v. Wheeler, 61 N. Y. 88; Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151; Guion v. Knapp, 6 Paige Ch. (N. Y.) 35; Howard Ins. Co. v. Holsey, 4 Sandf. 565, aff'd 8 N. Y. 271; Martin's Appeal, 97 Pa. St. 85.



redeem their shares by paying their respective proportions of the debt secured by the mortgage.<sup>1</sup> And where the mortgagee or holder of the mortgage has foreclosed on a portion of the premises and acquired the title thereto, he may require the owners of the equity of redemption in the remaining portion to redeem by paying the amount of the debt with which the remaining land is equitably chargeable.<sup>2</sup>

The general rule under the statutes of many of the states require the owner of an undivided interest in land seeking to redeem, to redeem the whole, and not simply his interest.<sup>3</sup> We have already seen that where a person interested in the mortgaged property is not made a party his right to redeem is not extinguished by the action;<sup>4</sup> and where such omitted person is the owner of a part of the mortgaged premises, he is entitled to redeem his land by paying a fair share of the mortgage debt.<sup>5</sup> A like rule applies to a case where a junior lienor, who has a mortgage on a portion of the premises, is not made a party to the proceedings in foreclosure.<sup>6</sup>

§ 926. **Same—Remedy on.**—Where a person having an interest in the whole or a portion of the mortgaged premises is compelled to redeem the entire estate to protect that interest, he will be subrogated to the rights of the mortgagor,<sup>7</sup> and may enforce his claim against those who ought to contribute ratably,<sup>8</sup> and have the mortgaged debt apportioned as justice may require.<sup>9</sup>

§ 927. **Statutes regulating redemption.**—The time

<sup>1</sup> Fogal v. Pirro, 17 Abb. (N. Y.); Pr. 113; s. c. 10 Bosw. (N. Y.) 100.

<sup>2</sup> Dukes v. Turner, 44 Iowa 575; Dooley v. Potter, 140 Mass. 49; George v. Wood, 93 Mass. (11 Allen) 41; Fogal v. Pirro, 17 Abb. (N. Y.) Pr. 113; s. c. 10 Bosw. (N. Y.) 100.

<sup>3</sup> Eiceman v. Finch, 79 Ind. 511.

<sup>4</sup> See: *Ante*, § 916.

<sup>5</sup> Green v. Dixon, 9 Wis. 532.

<sup>6</sup> Grattan v. Wiggins, 23, Cal. 16;

Fink v. Murphy, 21 Cal. 108; Kirkham v. Dupont, 14 Cal. 559; Martin v. Kelley, 59 Miss. 652.

<sup>7</sup> See: *Ante*, § 692

<sup>8</sup> See: *Post*, c. XLIV.

<sup>9</sup> Andrews v. Hubbard, 50 Conn. 351; Lyons v. Robbins, 45 Conn. 513; Smith v. Kelly, 27 Me. 237; Allen v. Clark, 34 Mass. (17 Pick.) 47; Gibson v. Crehore, 22 Mass. (5 Pick.) 152; Tillinghast v. Frye, 1 R. I. 53.

within which a redemption must be made in mortgage foreclosures is regulated by statute in the various states.<sup>1</sup> After a sale under a foreclosure decree, and the expiration of the statutory time for redemption, a bill in equity cannot be maintained to reverse the decree.<sup>2</sup>

In the case of *White v. Crow*,<sup>3</sup> however, where A had the right to redeem certain property from the lien of several judgments, and he redeemed from all but one, the validity of which he disputed, and the time ran by within which, under the statute, he should have redeemed from that. The court held that he should be allowed to redeem or to have returned to him the amount paid for redeeming the other judgments. It is said the case of *Knox v. Armstead*<sup>4</sup> that a power in a mortgage giving the mortgagee the right to purchase as if he were not a party, when exercised without fraud or oppression, deprives the mortgagor of the right to redeem. The supreme court of Illinois, in the case of *Anderson v. Olinroden*,<sup>5</sup> say that the foreclosure of a mortgage by a pledgee of it as collateral security, to which the mortgagee is made a party, but in which he fails to appear because of an alleged mistake as to the land involved; the rendering of a decree awarding a sale, allowing the pledgee or any party to the suit to become a purchaser, and ordering that in case the premises are not redeemed within fifteen months, all the defendants be barred of all right and equity of redemption therein; a purchase by the pledgee; and the

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<sup>1</sup> In **Arkansas** there is no right of redemption from a sale under a deed of trust executed prior to the Act of March 17, 1879, (Mansf. Dig. § 4759) providing for the redemption of property from mortgage sales. *Hudgins v. Morrow*, 47 Ark. 515.

In **Nevada** there is no right of redemption from a purchaser at a foreclosure sale. That right only exists for a reasonable time after breach as against the mortgagee, who has not sold the property. And the fact that

the purchaser knows that his vender is only a mortgagee, makes no difference as to the character of title acquired by the purchase. *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313.

<sup>2</sup> *Burley v. Flint*, 105 U.S. 247; bk. 26. L. ed. 986.

<sup>3</sup> 17 Fed. Rep. 98.

<sup>4</sup> 87 Ala. 511; s. c. 13 Am. St. Rep. 65; 5 L. R. A. 297; 6 So. Rep. 311.

<sup>5</sup> 145 Ill. 168; s. c. 34 N. E. Rep. 55, aff'd 44 Ill. App. 294.

lapse of the fifteen months, cut off all right and equity of redemption of the mortgagee in the premises.

In *Jackson v. Lawrence*,<sup>1</sup> where the debtor executed a deed absolute in terms to his creditor, with the verbal agreement that it was to secure a note, and that, if the note was not paid at maturity, the creditor should be authorized to sell the land, a *bona fide* purchaser of the land on a sale by the creditor after default, who paid just the amount due on the note, took the land free from all rights of creditors of the first grantor who levied an attachment on the land prior to the sale. Such attaching creditor of the mortgagee has no right of redemption.

§ 928. **Same—Designating a shorter time.**—Where the statute prescribes the period within which a redemption may be made after a foreclosure sale, the mortgagor and those claiming under him are entitled to the last hour of the last day in which to make redemption. Thus the supreme court of Illinois, in the case of *Hollingsworth v. Koon*,<sup>2</sup> hold that it is error to direct the dismissal of a bill to redeem if the plaintiff fail to pay within three months, saying that the full statutory period should be allowed. And the supreme court of Minnesota, in the case of *Hollingsworth v. Campbell*,<sup>3</sup> say the provisions of the statute of that state<sup>4</sup> declaring that “in case of strict foreclosure no final decree of foreclosure shall be rendered until the lapse of one year after the judgment adjudging the amount due on such mortgage,” applies to the judgment in an action to redeem, so that it is erroneous if it limits the time for redemption to a period less than one year from the date of rendering the judgment.

§ 929. **Same—Filing deed or certificate under.**—It is thought in those cases where the statute governing the foreclosure of mortgages requires the deed given by the sheriff on sale of the premises to be deposited with the register of

<sup>1</sup> 117 U. S. 697; bk 29 L. ed. 1024; s. c. 6 Sup. Ct Rep. 915.

<sup>2</sup> 117 Ill. 551; s. c. 8 N. E. Rep. 193; 6 *Id.* 148.

<sup>3</sup> 28 Minn. 18; s. c. 8 N. W. Rep. 873.

<sup>4</sup> Minn. Gen. Stat., 1878, c. 81, § 43.

deeds, and then declares that unless the premises are redeemed within the time provided by the statute the deed shall thereupon become operative, and may be recorded, and shall vest in the grantee all the right and title that the mortgagor had; should redemption not be made within a year from such sale and deposit of the deed, the right of redemption becomes forever barred; and it is not necessary that the deed be actually recorded in order to bar the equity of redemption.<sup>1</sup> Under the Michigan statute<sup>2</sup> the sheriff's deed on foreclosure at law should be filed immediately after the sale; and where this is done without unreasonable delay, the year for the redemption of the premises runs from the date of filing.<sup>3</sup> Under the Minnesota statute<sup>4</sup> a certificate of sale which contains the date of the sale, and a recital that the "premises are subject to redemption within the time and according to the statute," is a sufficient compliance with the statute as to stating the time of redemption.<sup>5</sup>

§ 930. Same—Accepting part payment—Effect.—It has been said that payments made after foreclosure by advertisement, and received with the clear understanding that the redemption is to be completed by paying the whole sum necessary for that purpose, within the year allowed by the statute, will be regarded as in affirmance and not in avoidance of the sale, and for that reason their acceptance does not operate as a waiver of the foreclosure.<sup>6</sup>

§ 931. Same—Mortgagor's possession during—Constitutionality of statute.—It has been held that a statute, providing the mortgagor shall, upon payment of interest, retain possession of the mortgaged premises during the period of redemption after foreclosure, does not impair the

<sup>1</sup> *Sanford v. Cahoon*, 63 Mich. 223; s. c. 20 N.W. Rep. 840; 5 West. Rep. 774. See: *Lilly v. Gibbs*, 39 Mich. 394; *Wells v. Atkinson*. 24 Minn. 161

<sup>2</sup> Mich. Comp. L. § 6920.

<sup>3</sup> *Lilly v. Gibbs*, 39 Mich. 394.

<sup>4</sup> Minn. Gen. Stat., c. 81, tit. I, § 11.

<sup>5</sup> *Wells v. Atkinson*, 24 Minn. 161.

<sup>6</sup> *Cameron v. Adams*, 31 Mich. 426. See: *Ante*, § 916.

mortgage contract; because it affects the remedy only.<sup>1</sup> But this doctrine has not proved entirely satisfactory to the profession and the courts. In the recent case of *Barnitz v. Beverly*,<sup>2</sup> the supreme court of the United States, reversing the supreme court of Kansas, held the Kansas statute,<sup>3</sup> providing that mortgagors shall have eighteen months for redemption, with full right of possession during that time, and forbidding another sale of the land for any deficiency in the first sale, is unconstitutional as applied to mortgages executed before its passage, because impairing, or tending to impair, the obligation of contracts. It is thought that such decision has been generally looked for by a large majority of the profession throughout the Union; and the fact that it is unanimously rendered by the highest tribunal in the land will doubtless have a salutary effect. In an early case<sup>4</sup> the supreme court of Kansas held that the Act in question, in so far as it assumed to operate retrospectively, was in violation of Section 10, of Article 1, of the Federal Constitution. The opinion of Chief Justice Horton, of the Kansas supreme court, in that case, is a very able and satisfactory exposition of the law. A change in the *personnel* of the Bench having occurred, the question was again brought up in *Beverly v. Barnitz*,<sup>5</sup> and it was held that the statute was intended to be retroactive, and that it was not unconstitutional. Numerous decisions of the Federal courts are cited in the opinions in both the cases in the supreme court of Kansas.

The gist of the argument in favor of the constitutionality of such statutes is that a redemption privilege granted to a mortgagor affects only the remedy and not the right. Such a contention is thought to be fallacious in theory and contrary to the substantial purport of many decisions of the supreme court of the United States. In the last decision on the question by the United States supreme court the opin-

<sup>1</sup> *Berthold v. Fox*, 13 Minn. 501; 49 Am. St. Rep. 257; 42 Pac. Rep. 725. s. c. 97 Am. Dec. 243.

<sup>3</sup> Kan. L. 1893, c. 109.

<sup>2</sup> 163 U. S. 118; bk. 41, L. ed.—; s. c. 16 Sup. Ct. Rep. 1042, reversing, 55 Kan. 466; s. c. 31 L. R. A. 74;

<sup>4</sup> *Watkins v. Glenn*, 55 Kan. 417; s. c. 40 Pac. Rep. 317.

<sup>5</sup> 42 Pac. Rep. 725.



ion by Mr. Justice Shiras, after reviewing the earlier cases, continues as follows: "Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or owner had no possession, title or right in any way to the premises.

"Under the new law the mortgagor shall have eighteen months from the date of sale within which to redeem, and in the meantime the rents, issues and profits, excepting what is necessary to keep up repairs, shall go to the mortgagor or the owner of the legal title, who in the meantime shall be entitled to the possession of the property. The redemption payment is to consist, not of the mortgage debt, interest and costs, but of the amount paid by the purchaser, with interest, costs and taxes. In other words, the act carves out for the mortgagor or the owner of the mortgaged property an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged (described in the mortgage as a good and indefeasible estate of inheritance, free and clear of all incumbrance), but a remainder—an estate subject to the possession, for eighteen months, of another person, who is under no obligation to pay rent or to account for profits. The twenty-third section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution, or general execution shall not again be liable for sale for any balance due upon the judgment or decree, under which the same is sold or any other judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem. Obviously, this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect, release the debtor from his personal obligation.

"We, of course, have nothing to do with the fairness or the policy of such enactments as respects those who choose

to contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months?

“The popular sentiment which led to the passage of the act in question in Kansas, and which, unfortunately, was strong enough to coerce the supreme court of that state to recede from the formerly sound position it had taken, is manifested on a wider scale in the present determined agitation to debase the standard of value, by making silver dollars of a fiat weight and quality the legal equivalent of gold dollars. Unfortunately there would be no remedy in the courts for Federal legislation of such character.<sup>1</sup> It is, however, a source of considerable satisfaction that the present decision of the supreme court by a unanimous vote indicates a disposition to jealously effectuate substantial rights of contract in so far as they are the subject of constitutional protection.”

§ 932. Same—Possession by purchaser during—Accounting.—In the case of *Dailey v. Abbott*,<sup>2</sup> it is held that where the purchaser takes possession before the period of redemption has expired, he is accountable for the rents and profits. The court say: “As long as the right to redeem exists the mortgagor is entitled to rent, if the mortgagee is in possession, taking the rents and profits. The statute prolongs the mortgagor’s right of redemption for one year after the sale. The purchaser at the sale takes the place of the mortgagee, and if he takes possession of the land before the period for redemption has expired,

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<sup>1</sup> Legal Tender cases, 79 U. S. bk. 28 L. ed. 204; s. c. 4 Sup. Ct. (12 Wall.) 457; bk. 20 L. ed. 287; Rep. 122.

*Juilliard v. Greenman*, 110 U. S. 421; <sup>2</sup> 40 Ark. 275.

there is no good reason why he should not be accountable for the rents and profits. On redemption he gets the money with interest. His vendor occupies no better position."<sup>1</sup>

§ 933. **Same—After foreclosure—By creditor.**—In some of the States, as in Minnesota,<sup>2</sup> under statutory provisions, where no redemption of mortgaged property sold on foreclosure under a power of sale is made within twelve months by the mortgagor, his heirs, executors and assigns, the senior creditor having a lien on the real estate, or some part thereof, subsequent to the mortgage, may redeem within a specified time after the expiration of the said twelve months, and each subsequent creditor having such lien may likewise redeem. Under such a statute a creditor of the grantee of the equity of redemption, having a lien on such property, may redeem as well as a creditor of the mortgagor.<sup>3</sup>

§ 934. **Same—Same—By junior lienor.**—Where junior lien holders are made parties to a suit to foreclose a prior lien, their equitable right to redeem will be barred, although still redemptioners under the statute;<sup>4</sup> but where not made a party to the foreclosure they are entitled to redeem by paying what is justly due the purchaser, and may do so even after the statutory time, and demand an accounting from a purchaser in possession;<sup>5</sup> for the title of a purchaser at a mortgage foreclosure sale, although relating back to the mortgage, as against the parties to the foreclosure, does not cut off the title of a subsequent purchaser of the lien of a subsequent incumbrancer by a recorded conveyance, who was not a party, so as to prevent a redemption by such purchaser or incumbrancer.<sup>6</sup> But it has been said that the

<sup>1</sup> Citing: 2 Jones on Mortg., § 1118.

<sup>2</sup> Minn. Gen. St., 1878, c. 81, § 3.

<sup>3</sup> Hospes v. Sanborn, 28 Minn. 48.

<sup>4</sup> Frink v. Murphy, 21 Cal. 108; s. c. 81 Am. Dec. 149.

<sup>5</sup> Randall v. Duff, 101 Cal. 82; s. c. 35 Pac. Rep. 440; Bunce v. West, 62 Iowa 80; s. c. 17 N. W. Rep. 179;

Newell v. Pennick, 62 Iowa 123; s. c. 17 N. W. Rep. 432; American Button-hole, &c., Co. v. Burlington Mut. Loan Assoc., 61 Iowa 464; s. c. 16 N. W. Rep. 527; Frink v. Murphy, 21 Cal. 108; s. c. 81 Am. Dec. 149.

<sup>6</sup> Randall v. Duff, 101 Cal. 82; s. c. 35 Pac. Rep. 440.

holder of a junior judgment not indexed at the time of the foreclosure of a senior mortgage cannot redeem after the statutory time for redemption has expired, although he was not made a party to the foreclosure.<sup>1</sup>

§ 935. Same—Same—By assignee of junior lienor. A junior lienor not made a party to an action to foreclose a prior mortgage can redeem after the statutory period fixed therefor;<sup>2</sup> but it has been said that the assignee of a junior note and mortgage, under an unrecorded assignment, is not entitled, after the expiration of the statutory time for redemption, to redeem, in equity, on the ground that he was not made a party to the foreclosure proceedings by the senior mortgagee.<sup>3</sup>

Where a senior mortgagee, pending his suit to foreclose, acquired the junior mortgage and a sale was had without the complaint being amended, the court held that the mortgagee, after the expiration of the year allowed by statute for redemption, was estopped from maintaining a suit to redeem or to foreclose as junior mortgagee.<sup>4</sup>

§ 936. Same—Same—Conditions on.—One who seeks to redeem from a sale under foreclosure proceedings to which he was not a party on general equitable principles, after the period for statutory redemption has expired, can do so only by paying the mortgage debt, without regard to the amount for which the property sold.<sup>5</sup>

<sup>1</sup> Sterling Manuf. Co. v. Early, 69 Iowa 94; s. c. 28 N. W. Rep. 458.

v. Early, 69 Iowa 94; s. c. 28 N. W. Rep. 458.

<sup>2</sup> See: *Ante*, § 934.

<sup>4</sup> Gordon v. Lee, 102 Ind. 125; s. c. 1 N. E. Rep. 290.

<sup>3</sup> Reel v. Wilson, 64 Iowa 13; s. c. 19 N. W. Rep. 814.

<sup>5</sup> Iowa County v. Beeson, 55 Iowa 262; s. c. 7 N. W. Rep. 597.

This is on the same principle that shuts out a junior lienor whose claim is not indexed. *Sterling Manuf. Co.*

For full discussion of condition on which redemption may be made after foreclosure, see: *Post*, § 999.

## CHAPTER XXXIX.

### REDEMPTION—WHO MAY REDEEM.

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| <p>§ 937. Introductory.</p> <p>938. Administrator and executor.</p> <p>939. Annuitant cannot redeem.</p> <p>940. Assignee of mortgage.</p> <p>941. Same—For support.</p> <p>942. Assignee of mortgagor—Right to redeem.</p> <p>943. Assignee of note given for land—May redeem when.</p> <p>944. Attorney may redeem when.</p> <p>945. Creditors may redeem when.</p> <p>946. Same—General creditors.</p> <p>947. Same—Attachment and judgment creditors.</p> <p>948. Same—From another creditor.</p> <p>949. Same—Having lien on land.</p> <p>950. Same—Of husband on mortgage of wife's property.</p> <p>951. Defendant may redeem.</p> <p>952. Devisees and legatees.</p> <p>953. Grantee in trust deed—May not redeem when.</p> <p>954. Grantor of lands mortgaged to secure debt of another.</p> <p>955. Grantor in deed absolute in form but mortgage in effect.</p> <p>956. Grantor in deed of trust.</p> <p>957. Guardians may redeem.</p> <p>958. Heirs of deceased mortgagor may redeem.</p> <p>959. Holder of legal estate may redeem.</p> <p>960. Holder of interest in mortgaged premises.</p> <p>961. Holder of easement in mortgaged premises.</p> <p>962. Holder of part of mortgaged premises.</p> <p>963. Holder of bond to convey can not redeem.</p> | <p>§ 964. Married woman mortgaging own property for husband's debt.</p> <p>965. Mortgagee—Junior may redeem.</p> <p>966. Same—Senior may not redeem.</p> <p>967. Mortgagor may redeem.</p> <p>968. Mortgagor and wife may redeem when.</p> <p>969. Mortgagors, joint—Redemption by.</p> <p>970. Partner may redeem.</p> <p>971. Persons in interest not made parties.</p> <p>972. Purchases—Subsequent purchasers.</p> <p>973. Same—Before foreclosure.</p> <p>974. Same—Pending foreclosure.</p> <p>975. Same—After foreclosure.</p> <p>976. Same—At execution sale.</p> <p>977. Same—At foreclosure sale.</p> <p>978. Same—From sole heir.</p> <p>979. Same—From grantee of owner of equity of redemption.</p> <p>980. Remainderman and reversioner.</p> <p>981. Stranger to transaction.</p> <p>982. Sub-agent may redeem <b>when.</b></p> <p>983. Subsequent purchaser.</p> <p>984. Sureties may redeem.</p> <p>985. Tenant by the curtesy.</p> <p>986. Tenant by dower.</p> <p>987. Tenant for life.</p> <p>988. Tenant for years.</p> <p>989. Tenant in common.</p> <p>990. Tenant in tail.</p> <p>991. Title insurance company <b>can</b> not redeem.</p> <p>992. Trustee of absent debtor.</p> <p>993. Wife joining in mortgage.</p> <p>994. Widow may redeem.</p> |
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§ 937. **Introductory.**—We have already seen<sup>1</sup> that the right of redemption is an incident of every mortgage; but this right can be exercised only by parties who hold the legal estate, or have an interest therein.<sup>2</sup> Anyone who has an interest in mortgaged lands, and would suffer loss by a foreclosure, may redeem.<sup>3</sup> One entitled to redeem land from the holder of the legal title on the payment of a certain balance due, has the same right of redemption on payment of that sum as against a mortgagee of the legal title, who was chargeable with notice of his rights.<sup>4</sup>

To entitle one to redeem he must show good title in himself, and a legal right to redeem, before he can effect the discharge of the mortgage, or remove the prior incumbrance, even though he holds the title of a mortgagor.<sup>5</sup> In keeping with this doctrine it has been said that a judgment declaring the plaintiff the owner of land and entitled to redeem it from the defendants as mortgagees, cannot be entered where the relation of debtor and creditor between the parties has never existed and there is no obligation of any character secured or to be secured by mortgage, since without such an obligation there can be no mortgage.<sup>6</sup>

As between several persons entitled to redeem, they can

<sup>1</sup> See: *Ante*, § 889.

<sup>2</sup> See: *Post*, § 981.

Particularly is this true in those cases where persons having an interest are not made parties to the proceedings. See: *Post*, § 971.

**Under Arkansas Act, December 15th, 1875**, the only persons who can redeem the real estate banklands sold to the state, are the owners of the equity of redemption therein. *Davies v. Hunt*, 37 Ark. 574.

**Minnesota Laws, 1860, c. 87, § 1**, authorizes a mortgagor, or other person claiming through or under him as an assign, to redeem from a foreclosure sale, not only within three years from the day of sale, but within three years after notice thereof filed in the office of the Register of Deeds. *Thompson v. Foster*, 21 Minn. 319.

A person in possession after full conveyance to a third person under parol agreement that he shall have a reconveyance upon certain conditions, will not be entitled to redeem from a sale made on the foreclosure of a mortgage made by his grantee, even though there has been a reconveyance, but the deed has not yet been recorded. *Sprague v. White*, 73 Iowa 670; s. c. 35 N. W. Rep. 751.

<sup>3</sup> See: *Post*, § 960.

<sup>4</sup> *Brooke v. Bordner*, 125 Pa. St. 470; s. c. 53, 17 Atl. Rep. 467; 24 N. W. C. 53.

<sup>5</sup> *Eastman v. Batchelder*, 36 N. H. 141; 72 Am. Dec. 295; *Farr v. Dudley*, 21 N. H. 372.

<sup>6</sup> *Shultz v. McLean*, 93 Cal. 329; s. c. 25. Pac. Rep. 427.

exercise this right according to the priority of their respective claims.<sup>1</sup>

The various persons and interests who are entitled to redeem in mortgage foreclosures are so numerous that it is thought best to treat each under its proper head, arranged alphabetically.

§ 938. **Administrator and executor.**—An administrator or an executor may have such an interest in the mortgaged premises as will entitle him to redeem them, either before or after sale.<sup>2</sup> Thus it has been said where the owner of land, after executing a deed of trust thereon to secure his debts, conveys it in fee simple, subject to such trust deed, and expressly reserves a lien for the purchase money, his administrator can redeem from foreclosure of the trust deed.<sup>3</sup>

The supreme court of Washington in *In re Clement's estate*,<sup>4</sup> say that mortgaged property included in the residuary clause of a will is not devised, within the meaning of the Washington Statute,<sup>5</sup> providing for the redemption by the executor of any mortgaged property which has not been devised.

§ 939. **Annuitant can not redeem.**—An annuitant is a person who is entitled to an annuity. An annuity is simply a yearly sum stipulated to be paid to another in fee or for life or for years and chargeable only on the person of the grantor.<sup>6</sup> An annuity is different from a rent charge,

<sup>1</sup> *Haines v. Beech*, 3 John. Ch. (N. Y.) 459. See: *Kalscheuer v. Upton*, 6 Dak. 449; s. c. 43 N. W. Rep. 816; *Bigelow v. Stringfellow*, 25 Fla. 366; s. c. 5 So. Rep. 816; *Rogers v. Heron*, 92 Ill. 583; *Dickerman v. Lust*, 66 Iowa 444; s. c. 23 N. W. Rep. 916; *Spurgin v. Adamson*, 62 Iowa 661; s. c. 18 N. W. Rep. 293; *Moore v. Beasom*, 44 N. H. 215; *Brewer v. Hyndman*, 18 N. H. 9.

<sup>2</sup> *Enos v. Sutherland*, 11 Mich. 538; *Percy v. Tate*, 91 Tenn. 478; s. c.

19 S. W. Rep. 325; *Merriman v. Barton*, 14 Vt. 501.

<sup>3</sup> *Percy v. Tate*, 91 Tenn. 478; s. c. 19 S. W. Rep. 323.

<sup>4</sup> 8 Wash. 323; s. c. 35 Pac. Rep. 1073.

<sup>5</sup> Wash. Code Proc., § 1035.

<sup>6</sup> *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209, 216; *Anderson's L. Dict.* 61; 2 Bl. Com. 40; 1 Bouv. L. Dict. (18th ed.) 161; 1 Co. Litt. (19th ed.) 144b; 3 Kent Com. (13th ed.) 460.

in this,—a rent charge is a burden imposed upon and issuing out of the lands, whereas an annuity is chargeable only upon the person of the grantor.<sup>1</sup> It is not an interest in real property; and where the annuity arises out of lands the annuitant has not an interest in the mortgaged lands entitling him to redeem from the mortgage.<sup>2</sup>

§ 940. Assignee of mortgage.—We shall hereafter see<sup>3</sup> that the assignee of a mortgagor's interest in the equity of redemption may exercise the right of redemption under similiar circumstances as the mortgagor himself. On the same principle of succession in interest the assignee of a junior mortgage will have the same rights as his assignor would have had, and the fact that the assignment of the mortgage to the holder was not recorded, does not defeat such right of redemption in those cases where there is no statute providing for the recording of assignments of mortgages and making such records notices, the parties claiming under the assignment are not guilty of laches in not securing them to be recorded.<sup>4</sup>

The supreme court of Wisconsin, in the case of *Farwell v. Murphy*,<sup>5</sup> say that the assignee of a second mortgage may maintain a bill for redemption against the assignee of the first mortgage, or by a bill of foreclosure make the assignee of the first mortgage a party, and obtain the usual decree of redemption against him.

The supreme court of Minnesota, in the case of *Bovey De Laitre Lumber Company v. Tucker*,<sup>6</sup> say that the assignee of a subsequent mortgage, under which the mortgagee has filed notice of intention to redeem from a sale under a former mortgage, may redeem under such notice.

§ 941. Same—For support.—The supreme judicial court of Maine, in the case of *Bryant v. Jackson*,<sup>7</sup> hold that

<sup>1</sup> *Wagstaff v. Lowerre*, 23 Barb. 209, 217.

<sup>5</sup> 2 Wis. 533.

<sup>6</sup> 48 Minn. 223; s. c. 50 N. W. Rep. 1038.

<sup>2</sup> *White v. Parnter*, 1 Knapp 266.

<sup>3</sup> See: *Post*, § 942.

<sup>7</sup> 59 Me. 165; s. c. *sub nom.* *Bryant v. Erskine*, 55 Me. 153.

<sup>4</sup> *Hasselman v. McKernan*, 50 Ind.

a bill in equity to redeem real estate from a mortgage conditioned for the support of the mortgagees and the survivor of them during life, brought by the assignee of the mortgagor against the assignee of the mortgagee, a distinct allegation that the interest of the mortgagor was assigned with the consent of the mortgagee is sufficient, although it was not alleged that such consent was in writing.<sup>1</sup> The supreme court of Vermont, in the case of *Austin v. Austin*,<sup>2</sup> say that a mortgage conditioned for the support of the mortgagee, admits of compensation, and in those cases where the mortgagor has conveyed his interest, the purchaser will be permitted to redeem, by making compensation for past support, to be settled by the master, and paying a specific allowance for the future support.

§ 942. Assignee of mortgagor—Right to redeem.—The mortgagor having a right to redeem, and this right being inseparably connected with the title,<sup>3</sup> and the right being an estate in the lands,<sup>4</sup> any one purchasing the mortgagor's right will be entitled to redeem under the same circumstances as the mortgagor would have been entitled to do so.<sup>5</sup> It has been held that such assignee, where not made a party to the foreclosure proceedings, will be entitled to redeem even though his deed is not on record at the time when the decree of foreclosure is rendered.<sup>6</sup> In case of an assignment by the mortgagor of his interest in the equity of redemption, and a certificate of redemption is thereafter issued in the name of the grantor to the grantee inures to the latter's benefit, where his offer to redeem in his own name has been refused by the sheriff under the

<sup>1</sup> See: *Lovell v. Farrington*, 50 Me. 239.

<sup>2</sup> 9 Vt. 420.

<sup>3</sup> See: *Ante*, § 889.

<sup>4</sup> See: *Ante*, § 899.

<sup>5</sup> *Powers v. Andrews*, 84 Ala. 289; s. c. 4 So. Rep. 263; *Paulling v. Barron*, 32 Ala. 9; *Scott v. Henry*, 13 Ark. 127; *Beach v. Shaw*, 57 Ill. 17; *Gilbert v. Hussman*, 76 Iowa 241;

s. c. 41 N. W. Rep. 3; *Skinner v. Miller*, 5 Litt. (Ky.) 84; *Wilkins v. French*, 20 Me. 111; *Taft v. Stetson*, 117 Mass. 471; *Brewer v. Hyndmann*, 18 N. H. 10; *Hepburn v. Kerr*, 9 Humph. (Tenn.) 726; *Hodson v. Treat*, 7 Wis. 263; *Case 114*, 3 Atk. 314.

<sup>6</sup> *Hodson v. Treat*, 7 Wis. 263.

direction of the mortgagee, who became the purchaser at the foreclosure sale.<sup>1</sup>

The supreme court of Arkansas, in the case of *Scott v. Henry*,<sup>2</sup> say that while it is true, as a general rule, that no person can come into a court of equity for a redemption of a mortgage except he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him, yet it is equally well settled that an assignment of a mortgage vests in the assignee the right to redeem; or one to whom a *bona fide* transfer of the mortgagor's estate is made may redeem the property; and the same rule extends to persons having any substantial interest in the property. Succeeding to all the rights of the mortgagor on the assignment, if there are circumstances which would induce the court to decree a redemption in favor of the representatives of the mortgagor, the assignee who stands in his place will have the benefit of it.<sup>3</sup> Thus it has been said that an assignee of the right of redemption, in a petition to redeem, may show a want or failure of consideration the same as the mortgagor himself might have done under a similar petition.<sup>4</sup>

The supreme judicial court of Massachusetts, in the case of *Taft v. Stetson*,<sup>5</sup> where a mortgagee entered upon land to foreclose a mortgage in which the mortgagor's wife had not joined, but did not take possession of the house, nor receive rent therefor, the wife having continued in possession of the house claiming it as a homestead, the court held that on a bill in equity to redeem, brought by an assignee of the mortgagor an accounting for rents and profits of the house could not be had.

The supreme court of Minnesota, in the case of *Cuilerier v. Brunelle*,<sup>6</sup> say that a junior mortgagee is not an "assign" of the mortgagor, as the word is used in the Minnesota statute entitling assigns to redeem within a year from the foreclosure of a prior mortgage.

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<sup>1</sup> *Wilber v. Miller* (Org. 1893), 37 Pac. Rep. 827.

<sup>2</sup> 13 Ark. 127.

<sup>3</sup> Case 114, 3 Atk. 314.

<sup>4</sup> *Brewer v. Hyndmann*, 18 N.H. 10.

<sup>5</sup> 117 Mass. 471.

<sup>6</sup> 37 Minn. 71; s. c. 33 N. W. Rep. 123.



§ 943. Assignee of note given for land—May redeem when.—In the case of *Tarbell v. Durant*,<sup>1</sup> a part of certain land held by one as mortgagee, by absolute deed, was sold, and the vendee mortgaged it to the original mortgagee, agreeing that the latter should hold the mortgage note and mortgage in place of the land so sold. The original owner of the land then assigned the note, subject to the mortgagee's interest, to orator, who, to protect his own interest, paid a subsequent decree of foreclosure procured by the mortgagee on the land remaining unsold and the note, in a suit to which orator was a party defendant. The court held that the assignee of the note had a right to redeem from the decree of foreclosure in favor of the mortgagee.<sup>2</sup>

§ 944. Attorney may redeem when.—An attorney becomes a "creditor" having a lien," within the meaning of a statute<sup>3</sup> relating to the redemption of real estate, where a judgment is confessed in his favor for a sum due upon a prior contract, and the confession of judgment is made for the sole purpose of enabling him to redeem.<sup>4</sup> Thus in a case the owner of the land, whose title was in litigation, made a contract with his attorney, to convey to him, for his services, one third of the land in case he succeeded in recovering the land; and the attorney brought the litigation to a successful termination, but in the meantime certain mortgages executed by the owner having been foreclosed, and the time of redemption about to expire, and the owner not being able to redeem, confessed judgment in favor of his attorney for his services, for an amount which does not appear to have been in excess of the value of one third of the land. The judgment was confessed to enable the attorney to redeem the land, and thereby secure compensation for his services. The court held that this confession of judgment was not a fraud on the purchaser at the mortgage sale.<sup>5</sup>

<sup>1</sup> 61 Vt. 516; s. c. 17 Atl. Rep. 44.

<sup>2</sup> The court cites in support of this holding, *Coop. Eq. Pl. 14*; *Hurd Eq. Pl. 45*.

<sup>3</sup> See: *Post*, § 949.

<sup>4</sup> Minn. Gen. Stat., 1878, c. 66, § 323; c. 81, § 16.

<sup>5</sup> *Atwater v. Manchester Savings Bank*, 45 Minn. 341; s. c. 48 N. W. Rep. 187; 12 L. R. A. 741.

<sup>6</sup> *Id.*

§ 945. **Creditors may redeem when.**—All creditors of the mortgagor having an interest in the mortgage premises are entitled to redeem in the order of the priority of their respective liens.<sup>1</sup> This right of redemption is regulated by statute in many of the states. Where a senior creditor's right to redeem becomes vested under the statute, it cannot be divested without due process of law.<sup>2</sup>

§ 946. **Same—General creditors.**—The simple fact that a person is a creditor of the mortgagor, or owner of the equity of redemption in mortgaged lands, will not entitle him to redeem them; the claim must be of such a nature as to give him some interest in the mortgaged lands,—a right to look to or appropriate them to the payment of his claim,—before he will be entitled to redeem. A case which illustrates this principle has recently been decided by the supreme court of Maryland. That court say that a lien or quasi-lien upon the land of a decedent given by the statute of Maryland,<sup>3</sup> making such land contingently or conditionally liable to be sold for the payment of his debts, such lien is not such a right or interest in the real estate as to give a general creditor the right to redeem from a mortgage upon such real estate, and be subrogated to the right of the mortgagee.<sup>4</sup>

§ 947. **Same—Attachment and judgment creditors.**—A creditor who has caused the mortgaged property to be attached for the payment of his claim, and who is not made a party to a suit to foreclose a prior mortgage, will be entitled to redeem therefrom;<sup>5</sup> because an attaching creditor

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<sup>1</sup> See: *Kalscheuer v. Upton*, 6 Dak. 449; s. c. 43 N. W. Rep. 816; *Bigelow v. Stringfellow*, 25 Fla. 366; s. c. 5 So. Rep. 816; *Rogers v. Heron*, 92 Ill. 583; *Dickerman v. Lust*, 66 Iowa 444; s. c. 23 N. W. Rep. 916; *Spurgen v. Adamson*, 62 Iowa 661; s. c. 18 N. W. Rep. 293; *Moore v. Beasom*, 44 N. H. 215; *Brewer v. Hyndman*, 18 N. H. 9; *Haines v. Beecher*, 3 John. Ch. (N. Y.) 459.

<sup>2</sup> See: *Willis v. Jelineck*, 27 Minn. 18; s. c. 6 N. W. Rep. 373.

<sup>3</sup> Md. Code, art. 16, § 188.

<sup>4</sup> *McSiece v. Elison*, 78 Md. 163; s. c. 27 Atl. Rep. 940.

<sup>5</sup> *Briggs v. Davis*, 108 Mass. 322; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341; s. c. 48 N. W. Rep. 187; 12 L. R. A. 741; *Chandler v. Dyer*, 37 Vt. 345.

who has not yet obtained judgment has a lien on the real estate attached, within the meaning of the statute<sup>1</sup> relating to redemption of real estate, and which gives any one having lien a right to redeem.<sup>2</sup> But it has been said by the supreme court of Missouri that an attaching creditor cannot maintain a suit to redeem land attached for a mortgage executed by the defendant in the judgment suit.<sup>3</sup>

A judgment creditor who has reduced his claim to judgment, and the judgment has become a contention lien on the mortgaged property, has such an interest in the premises as entitles him to redeem from the lien of a mortgage.<sup>4</sup> To entitle a judgment creditor to redeem

<sup>1</sup> As Minn. Gen. Stat., 1878, c. 66, § 323; c. 81 § 16.

<sup>2</sup> *Atwater v. Manchester Sav. Bank*, 45 Minn. 341; s. c. 48 N. W. Rep. 187; 12 L. R. A. 741.

<sup>3</sup> *Fisher v. Tallman*, 74 Mo. 39.

<sup>4</sup> *Florence Land Min. & Mfg. Co. v. Warren*, Ala., s. c. 9 So. Rep. 384; *Powers v. Robinson*, 90 Ala. 225; s. c. 8 So. Rep. 10; *Walden v. Speigner*, 87 Ala. 390; s. c. 6 So. Rep. 80; *Wilkins v. Wilson*, 51 Cal. 212; *Kent v. Laffin*, 2 Cal. 595; *Shroeder v. Bauer*, 41 Ill. App. 484; *Fitch v. Wetherbee*, 110 Ill. 475; *Schuck v. Gerleach*, 101 Ill. 338; *Grob v. Cushman*, 45 Ill. 119; *Lamb v. Richards*, 43 Ill. 312; *McClain v. Sullivan*, 85 Ind. 174; *Long v. Mellet* (Iowa 1895), 63 N. W. Rep. 190; *Albee v. Curtis*, 77 Iowa 644; s. c. 42 N. W. Rep. 508; *Hill v. Holliday*, 2 Litt. (Ky.) 332; *White v. Bond*, 16 Mass. 400; *Lowry v. Akers*, 50 Minn. 508; s. c. 52 N. W. Rep. 922; *Marston v. Williams*, 45 Minn. 116; s. c. 47 N. W. Rep. 640; 43 Alb. L. J. 130; *Willard v. Finnegan*, 42 Minn. 476; s. c. 44 N. W. Rep. 985; 8 L. R. A. 50; *Berryhill v. Potter*, 42 Minn. 279; s. c. 44 N. W. Rep. 251; *Bartleson v. Thompson*, 30 Minn. 161; s. c. 14 N. W. Rep. 795;

*Pamperin v. Scanlan*, 28 Minn. 345; s. c. 9 N. W. Rep. 868; *Willis v. Jelineck*, 27 Minn. 18; s. c. 6 N. W. Rep. 373; *Worthington v. Wilmot*, 59 Miss. 608; *Mallalieu v. Wickham*, 42 N. J. Eq. (15 Stew.) 297; s. c. 10 Atl. Rep. 880; *Bigelow v. Cassidy*, 26 N. J. Eq. (11 C. E. Gr.) 557; *Brainard v. Cooper*, 10 N. Y. 536; *Belden v. Slade*, 26 Hun (N. Y.) 635; 638; *Van Buren v. Olmsted*, 5 Paige Ch. (N. Y.) 9; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Lance v. Gorman*, 136 Pa. St. 200; s. c. 20 Atl. Rep. 729; *Burden v. Robinson*, 9 Baxt. (Tenn.) 364; *Jackson v. Lawrence*, 117 U. S. 679; bk. 29 Law ed. 1024; s. c. 6 Sup. Ct. Rep. 915; *Scripster v. Bartleson*, 43 Fed. Rep. 259; *Connecticut Mut. Life Ins. Co. v. Crawford*, 21 Fed. Rep. 281; *United States v. Sturges*, 1 Paine C. C. 525; *Stonehewer v. Thompson*, 2 Atk. 440; *Mildred v. Austin*, L. R. 8 Eq. 220; *Neate v. Marlborough*, 3 Myl & C. 407.

A judgment creditor of a mortgagor who has given a deed absolute in form, taking back a separate defeasance, may maintain an action against the mortgagee or the latter's grantees to have his judgment declared a lien upon

from a foreclosure sale of the land of his debtor, it is not

the equity of redemption of the mortgagor in the mortgaged lands. *Mars-ton v. Williams*, 45 Minn. 116; s. c. 47 N. W. Rep. 644; 43 Alb. L. J. 130.

Where a foreclosure was irregular through failure to make parties thereto, B, a judgment creditor, who was an incumbrancer subsequent to the mortgage, and S, assignee of the judgment debtor, the court held that B might redeem from the sale; but he would be required to pay the costs of his action unless it was improperly resisted. *Belden v. Slade*, 26 Hun (N. Y.) 635.

**In Alabama** a judgment creditor of the estate of an insolvent, who has not filed his judgment within nine months after the decree of insolvency, cannot redeem the property from a sale on foreclosure of a mortgage thereon. *Walden v. Speigner*, 87 Ala. 390; s. c. 6 So. Rep. 80.

**In Iowa** the right of a judgment creditor to redeem from the sale under a senior mortgage is absolutely barred in ten years from the date of his judgment, under Iowa Code, § 2882, and non-residence makes no difference. *Albee v. Curtis*, 77 Iowa 644; s. c. 42 N. W. 508.

**In Indiana**, under a statute providing that a judgment creditor who redeems "shall maintain a lien on the premises for the amount of money so paid for redemption against the owner and any junior incumbrancer," a junior incumbrancer so redeeming occupies the same priority as to the redemption money that the original judgment creditor occupied. *McClain v. Sullivan*, 85 Ind. 174.

**In Minnesota** where a second mortgagee purchased an assignment

of the certificate of sale on the first mortgage, but fulfilled none of the requirements of Minn. Gen. Stat., 1878, c. 81, § 16, which regulates redemption by creditors, the court held that he could not hold the premises as against the holder of a third lien thereon, who had fulfilled all such requirements, and paid the amount for which the premises sold with interest. *Pamperin v. Scanlan*, 28 Minn. 345; s. c. 9 N. W. Rep. 868.

Any judgment creditor has a right to file a bill against the mortgagor and mortgagee, and redeem the mortgaged property, by paying what is actually due on the mortgage. *Hill v. Holliday*, 2 Litt. (Ky.) 332.

**Amount a judgment creditor is bound to pay to redeem mortgaged premises, after a statute foreclosure, is the sum actually due upon the mortgage, and not the sum bid by the purchaser.** *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58.

**Heirs—Judgment against.**—One having a judgment lien against one of the heirs of a deceased intestate mortgagor may redeem from the mortgage sale. *Willis v. Jelineck*, 27 Minn. 18; s. c. 6 N. W. Rep. 373.

From a foreclosure made after the death of the mortgagor, judgment creditors of the heirs of the mortgagor may redeem, the creditor of any particular heir paying that proportion of the sum for which the land was sold which such heir's interest in the land bears to the whole. *Schuck v. Gerlach*, 101 Ill. 338.

**Same—Redeeming part.**—The holder of a judgment against the original mortgagor may redeem and subject to his claim three-fifths of the land, after creditors of the mortgagor's

enough that he is a creditor,<sup>1</sup> if his lien has been extin-

heirs have acted similarly with regard to two-fifths thereof, the time limited for such redemption not having expired, and the fact that the execution, of which the redeンプtor was only assignee, was improperly issued in his name, will not invalidate the proceedings. *Schuck v. Gerlach*, 101 Ill. 338.

**Homestead—A mere judgment creditor has no lien on a debtor's homestead** so as to be entitled to redeem from a purchaser under a foreclosure of a senior mortgage. *Spurgin v. Adamson*, 62 Iowa 661; s. c. 18 N. W. Rep. 293.

**In United States courts.**—A judgment creditor may redeem premises from a sale under judgment or decree of a United States court by suing out execution upon his judgment in the ordinary manner, placing his execution in the hands of the proper officer to execute, and paying the money needed to redeem to the clerk of the United States court, together with the commissions of the clerk for receiving and paying the money, but payment of the money into the hands of the sheriff is not sufficient. *Connecticut Mut. Life Ins. Co. v. Crawford*, 21 Fed. Rep. 281.

**Partnership bonds—Judgment creditors of member of firm may not redeem** that land conveyed to a partnership in its common or firm name being not the joint property of the associates, but vests in the several partners as tenants in common, a judgment creditor cannot redeem from a mortgage-foreclosure sale of lands held by a partnership in its firm name, under Ala. Code 1886, § 2605, providing that a judgment recovered against partners in their common or

firm name binds only the joint property of all the associates. *Powers v. Robinson*, 90 Ala. 225; s. c. 8 So. Rep. 10.

But it is said that a judgment creditor of a member of a firm may, under Alabama Code, 1886, § 1883, redeem lands belonging to his debtor individually from a sale under a mortgage executed by both members of the firm. *Florence Land Min. & Mfg. Co. v. Warren*, 91 Ala. 533; s. c. 9 So. Rep. 384.

**Permitted where premises in hands of heirs or personal representatives** of the mortgagee on payment of the amount justly due. *Van Buren v. Olmstead*, 5 Paige Ch. (N. Y.) 9.

**A judgment cannot be entered** declaring the plaintiff to be the owner of land and entitled to redeem land from defendants as mortgagees cannot be entered where the relation of debtor and creditor between the parties has never existed, and there is no obligation of any character secured or to be secured by mortgage, since without such an obligation there can be no mortgage. *Schultz v. McLean*, 93 Cal. 329; s. c. 25 Pac. Rep. 427; 28 Pac. Rep. 1053.

**After mortgagor has failed to redeem** a judgment creditor of a mortgagor who has conveyed his equity of redemption before the foreclosure sale, and has allowed the time for redemption to pass, may redeem from the sale. *Fitch v. Wetherbee*, 110 Ill. 475.

<sup>1</sup> The court of appeals of Illinois has held it is not necessary that a judgment should be a lien against the land to entitle the judgment creditor to redeem. *Shroeder v. Bauer*, 41



guished,<sup>1</sup> or does not exist.<sup>2</sup> It is well settled by the decisions that the mere fact that a person occupies the position of a second mortgagee, or subsequent judgment creditor, does not entitle him to redeem the prior mortgage. Unless some special equity exists in the subsequent incumbrancer, the prior mortgagee has a right to retain his security, and may refuse to surrender it, so long as the mortgagor does not wish to discharge it. If the second incumbrancer is in danger of losing the benefit of his security, unless he is permitted to redeem, and the circumstances are such that equity would subrogate him, upon making these facts known to the first mortgagee, and making him an unconditional tender of his money, he is put upon his inquiry, and, after taking a reasonable time to be advised, his refusal to accept the tender and deliver up his mortgage is at his peril.<sup>3</sup> A junior judgment creditor can enforce the equity of redemption after a collusive foreclosure to which he was not a party,<sup>4</sup> and upon tendering to the purchaser of land sold under a deed of trust the necessary amount, and offering to give credit upon his judgment, may maintain a bill to redeem from such purchaser.<sup>5</sup>

A redemption by a judgment creditor from a mortgage which is good on its face, and at the most is merely voidable at the election of the purchaser at the mortgage sale, cannot be attacked in a suit between him and a vendee of the mortgagor, whose rights have been cut off by the foreclosure.<sup>6</sup> But a judgment creditor who has redeemed from

Ill. App. 484, aff'd on other grounds in 140 Ill. 135, 29 N. E. 560. This case is not in harmony with the current of authority.

<sup>1</sup> **Holder of a second judgment** subsequent to one under which land is sold loses the right to redeem from a prior foreclosure sale by a sale on execution which cuts off his lien. *Lowry v. Akers*, 50 Minn. 508; s. c. 52 N. W. Rep. 922.

**Owner of a judgment that has ceased to be a lien has no right to redeem from a sale under a mortgage**

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lien which was prior to his judgment. *Long v. Mellet* (Iowa, 1895), 63 N. W. Rep. 190.

<sup>2</sup> He must take out an execution first. *Quinn v. Brittain*, 1 Hoffm. Ch. (N. Y.) 353.

<sup>3</sup> *Bigelow v. Cassidy*, 26 N. J. Eq. (11 C. E. Gr.), 557.

<sup>4</sup> *Worthington v. Wilmot*, 59 Miss. 608.

<sup>5</sup> *Burton v. Robinson*, 9 Baxter (Tenn.), 364.

<sup>6</sup> *Willard v. Finnegan*, 42 Minn. 476; s. c. 44 N. W. Rep. 985; 8 L. R. A. 50.

the foreclosure property of his debtor sufficient in value to satisfy his judgment, cannot redeem any other property under his judgment.<sup>1</sup>

It has been said by the supreme court of Connecticut, in the case of *Loomis v. Knox*,<sup>2</sup> that the foreclosure of a judgment lien on one of two tracts covered by it, for more than the amount of the entire debt, is a redemption of the other tract, and subrogates the debtor to the right of the judgment creditor to redeem a first mortgage on such tract, which has been foreclosed without making the latter a party to the foreclosure proceedings.

§ 948. Same.—From another creditor.—The right of the successive holders of a series of notes, maturing at different times, and secured by the same mortgage, to redeem from a foreclosure and sale in favor of the holder of the note first maturing, is the same as that of separate junior encumbrancers to redeem from a foreclosure of a prior mortgage.<sup>3</sup> But a mortgagee cannot redeem the mortgaged land from one who has himself redeemed it from the purchaser at a sale to foreclose a vendor's lien, under a statute<sup>4</sup> permitting one judgment creditor to redeem from another, upon tender or payment of the amount given by the latter, and a stipulated per cent. per annum thereon in addition.<sup>5</sup>

§ 949. Same.—Having lien on land.—A person having a specific lien on land mortgaged to secure the debt of another, is entitled to redeem the land from the lien of such mortgage by paying the amount due thereon.<sup>6</sup> Under a statute pro-

<sup>1</sup> *Scripter v. Bartleson*, 43 Fed. Rep. 259.

<sup>2</sup> 60 Conn. 343; s. c. 22 Atl. Rep. 771.

<sup>3</sup> *Preston v. Hodgen*, 50 Ill. 56.

<sup>4</sup> As Ala. Code § 1885.

<sup>5</sup> *Owen v. Kilpatrick*, 96 Ala. 421; s. c. 11 So. Rep. 476.

<sup>6</sup> In *Martin v. Sprague*, 29 Minn. 53; s. c. 11 N. W. Rep. 143, A owned lots 11 and 12, 12 being a homestead. A and wife mortgaged

to B. A foreclosure sale of both lots in one parcel was made in November, 1879. In November, 1880, A's wife paid the purchaser the amount for which the property was sold, and took assignments of the certificate of sale and of the mortgage. In July, 1879, C recovered judgment against A, which was docketed, and became a lien on the debtor's real estate, except his homestead. Minn. Gen. St. 1878, c. 81, § 16, gives a right of redemp-

viding for redemption from foreclosure sale by "creditor having a lien on the land or some part thereof,"<sup>1</sup> a second mortgagee is within the meaning of the statute, and so is a person having a lien on an undivided interest therein.<sup>2</sup>

§ 950. **Same—Of husband on mortgage of wife's property.**—A creditor of the husband has no right to redeem from a mortgage by the husband and wife of the wife's land;<sup>3</sup> and a creditor of a husband suing to subject to the payment of his debt a building erected by the husband with his own money on his wife's land, has no right to redeem from a mortgage on the land executed by the wife, and is therefore under no duty to offer to redeem.<sup>4</sup>

§ 951. **Defendant may redeem.**—Where the mortgagor is the defendant in an action of foreclosure he is entitled to redeem under the general rules already laid down.<sup>5</sup> In some of the states, as in Iowa, it is provided by statute that the "defendant" may redeem. Where a statute so provides, the word "defendant" is held to mean that the mortgagor or person holding the legal or possibly an equitable title subject to the mortgage.<sup>6</sup>

§ 952. **Devisees and legatees.**—We have already seen that the assignee of the equity of redemption of the mortgagor may redeem under like circumstances as the mort-

tion to creditors having a lien "on the real estate or some part thereof." The court held that A's wife did not redeem the property from the mortgage, and that C could redeem both parcels, and, by taking the proper steps, became vested with title to both.

<sup>1</sup> As Minn. Gen. Stat. 1878, c. 81, § 16.

<sup>2</sup> Willis v. Jelineck, 27 Minn., 18; s. c. 6 N. W. Rep. 373.

<sup>3</sup> See: Ware v. Seasongood, 92 Ala. 152; s. c. 9 So. Rep. 138; Ware v. Hamilton, 92 Ala. 145; s. c. 9 So. Rep. 136. Abraham v. Chenoweth, 9 Oreg. 348. In Abraham v. Chenoweth, 9 Oreg.

348, A and B, his wife, mortgaged B's land, and after B's death the mortgage was foreclosed and the land bought by C. The grantee of B's heirs then redeemed the premises from C, and took possession. In ejectment by A's grantee to recover possession of A's life estate, the court held that he could not recover.

<sup>4</sup> Ware v. Hamilton Brown Shoe Co., 92 Ala. 145; s. c. 9 So. Rep. 136; Ware v. Seasongood, 92 Ala. 152; s. c. 9 So. Rep. 138.

<sup>5</sup> See: *Ante*, § 937.

<sup>6</sup> Miller v. Ayres, 59 Iowa 424; s. c. 13 N. W. Rep. 436.

gagor himself,<sup>1</sup> and where the mortgagor or owner of the equity of redemption has devised his equity of redemption, on his death his devisee may redeem.<sup>2</sup> In those cases where a legacy is made a charge on the real estate, it is thought the legatee has such an interest in the land on which the legacy is a charge as will entitle him to redeem.<sup>3</sup>

§ 953. **Grantee in trust deed—May not redeem when.**—In those cases where, in default of the payment of the sum secured by deed of trust, the property is sold and purchased by the *cestui que trust*, it is thought the vendee has no right to redeem without first giving security for the payment of interest to accrue after the sale, and for all damage and waste occasioned or permitted by the party whose property is sold.<sup>4</sup>

§ 954. **Grantor of lands mortgaged to secure debt of another.**—The court of chancery of New Jersey, in the case of *McKee v. Jordan*,<sup>5</sup> say that a grantor in a deed delivered to an attorney with authority to deliver it to the grantee as security for the loan of a stated sum to her son may redeem upon paying that sum only, where the grantee, although notified by the solicitor of the amount it was intended to secure, accepted it as security for an additional sum previously advanced the son, relying upon the latter's false statement that it was intended by the grantor as security for the total amount. And the supreme court of New York have held that a grantor who has conveyed lands held adversely to him has no cause of action in his own right to redeem from a mortgage on such lands made by a former owner.<sup>6</sup>

§ 955. **Grantor in deed absolute in form but mortgage in effect.**—Where a deed, absolute in form, is given to

<sup>1</sup> See: *Ante*, § 942.

<sup>2</sup> *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Stokes v. Solomons*, 9 Hare 75; *Faulker v. Daniel*, 3 Hare 199; *French v. Newham*, 2 Vern. 216.

<sup>3</sup> See: *Batchelder v. Middleton*, 9 Hare 75.

<sup>4</sup> *Johnson v. Atchison*, 90 Mo. 48; s. c. 1 S. W. Rep. 751; 6 West. Rep. 466.

<sup>5</sup> 50 N. J. Eq. (5 Dick.) 306; s. c. 24 Atl. Rep. 393.

<sup>6</sup> *Johnson v. Snell*, 53 Hun (N. Y.) 606, mem.; 34 N. Y. S. R. 177; 11 N. Y. Supp. 368.

secure a debt, the grantor, or those in priority to him, have the same right to redeem that they would have were the instrument a formal mortgage; and this right extends to an assignee of the grantee with notice of the nature of transaction.<sup>1</sup> Thus it is said by the supreme court of Nebraska, in the case of *Eiseman v. Gallagher*,<sup>2</sup> that the original grantor in a deed which is in fact a mortgage is entitled to redeem from a subsequent purchaser with notice of sufficient facts to put him upon inquiry, on paying the amount of the loan, with interest.

Such a grantor who has received part of the proceeds of a mortgage made by his grantee, can redeem only by paying it as well as his original debt; but if the grantee used the proceeds for himself or to discharge debts of the grantor which he was bound to pay, the grantor is entitled to credit on the original debt for the amount of the second mortgage.<sup>3</sup> And where such an instrument has been made without any intent to defraud creditors, the grantor cannot be barred of his right to redeem by the fact that, after making it, he has used it as a shield against creditors by representing that the conveyance is absolute.<sup>4</sup>

§ 956. **Grantor in deed of trust.**—A deed of trust is in nature and effect similar to a mortgage in that it is given to secure the payment of a debt, and on payment in accordance with the terms the grantor is entitled to have the lien discharged. A grantor in a deed of trust, like a grantor in an ordinary mortgage, who, on the maturity of the debt secured thereby, tenders the amount due may, upon refusal of the tender, maintain a bill to redeem.<sup>5</sup> But it is said in

<sup>1</sup> See: *Turman v. Bell*, 54 Ark. 273; s. c. 15 S. W. Rep. 886; *Townsend v. Peterson*, 12 Colo. 491; s. c. 21 Pac. Rep. 619; 2 Denv. L. N. 185; *Belton v. Avery*, 2 Root (Conn.) 279; s. c. 1 Am. Dec. 70; *Daniels v. Alvord*, 2 Root (Conn.) 195; *Eiseman v. Gallagher*, 24 Neb. 79; s. c. 37 N. W. Rep. 941; *Vanderhaise v. Hughes*, 13 N. J. Eq. (2 Beas.) 410; *Ballard v. Jones*, 6 Humph. (Tenn.) 455; *Still v.*

*Buzzell*, 60 Vt. 478; s. c. 12 Atl. Rep. 209.

<sup>2</sup> 24 Neb. 79; s. c. 37 N. W. Rep. 941.

<sup>3</sup> *Turman v. Bell*, 154 Ark. 273; s. c. 15 S. W. Rep. 886.

<sup>4</sup> *Townsend v. Peterson*, 12 Colo. 491; s. c. 21 Pac. Rep. 619; 2 Denv. Legal News 185.

<sup>5</sup> *Willemin v. Dunn*, 93 Ill. 511.



*Van Meter v. Darrah*,<sup>1</sup> that under the Missouri statute,<sup>2</sup> a grantor in a deed of trust, to avail himself of the right to redeem from a sale under the power conferred thereby must give security, as required by that statute,<sup>3</sup> within a reasonable time after sale; and that four months after a sale made when the grantor was temporarily insane and confined in an asylum and three and a half months after his restoration and actual notice to him of the sale, is not such reasonable time as the statute contemplates.

The court of appeals of Colorado, in the case of *McMeel v. O'Connor*,<sup>4</sup> say that the grantor in a trust deed which was void because the parties were reversed—the property being conveyed to the beneficiary instead of the trustee—has the right to pay off the debt secured thereby, and to receive a release of the property conveyed, clear of a cloud cast upon it by a pretended sale and deed executed by the trustee named in the trust deed.

§ 957. **Guardians may redeem.**—In those cases where a mortgage is given to the special guardian of an infant for the benefit of the latter, the special guardian is the proper person to file a bill for the redemption and assignment<sup>5</sup> of a senior mortgage<sup>6</sup> because he is a person who has a right to, interest in or lien upon the lands embraced in the mortgage.<sup>7</sup>

§ 958. **Heirs of deceased mortgagor may redeem.**—Where a mortgagor, owner of the equity of redemption, dies having devised his right of redemption, his devisee may redeem,<sup>8</sup> but if he dies without having either assigned or devised this equity, it descends to and becomes vested in his heirs,<sup>9</sup> and is not barred by a sale of the land, under

<sup>1</sup> 115 Mo. 153; s. c. 22 S. W. Rep. 30.

<sup>2</sup> Mo. Rev. Stat. 1879, § 3293.

<sup>3</sup> *Id.* § 3299.

<sup>4</sup> 3 Colo. App. 113; s. c. 32 Pac. Rep. 132.

<sup>5</sup> See: *Ante*, § 895.

<sup>6</sup> *Pardee v. Van Auken*, 3 Barb.

(N. Y.) 534. See: *Marvin v. Schilling*, 12 Mich. 356.

<sup>7</sup> *Belden v. Slade*, 26 Hun (N. Y.) 635, 641.

<sup>8</sup> See: *Ante*, § 952.

<sup>9</sup> *Brown v. Stark*, 12 Wis. 572; s. c. 78 Am. Dec. 762. See: *Butts v. Boughton*, 72 Ala. 294; *Sheldon v.*

a decree of foreclosure, in an action in which the administrator of such deceased mortgagor is the defendant, and the heirs are not joined.<sup>1</sup> The supreme court of Illinois, in the case of *Hunter v. Dennis*,<sup>2</sup> say that, when the mortgagor's widow pays the debt and takes a deed herself, the mortgagor's heirs may redeem from her.

§ 959. **Holder of legal estate may redeem.**—It was settled as early as the case of *Lomax v. Bird*,<sup>3</sup> decided in 1683, that no one can redeem from the lien of the mortgage who cannot show a title in the equity of redemption.<sup>4</sup> In deciding the case of *James v. Bion*,<sup>5</sup> in 1818, Lord Eldon said; "It is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee. In *Grant v. Duane*,<sup>6</sup> the court held that no person can come into a court of equity for a redemption of a mortgage except he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest therein under him. If the applicant shows no interest in himself, or a right to redeem the mortgage on his own account, or on account of others, with whom some connection is shown and whose interest he has a right to represent, his claims cannot be supported, notwithstanding some other person might have a right to enforce the same claim. A mere volunteer cannot be allowed to them to speculate on the claims of others, and redeem at their peril, and then litigate with those who may have the right."

On the other hand, it is equally well settled that any person who holds a legal estate in the mortgaged prem-

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*Bird*, 2 Root (Conn.) 509; *Hunter v. Dennis*, 112 Ill. 568; *Storr v. Bounds*, 1 Ohio St. 107, 109; *Zagel v. Kuster*, 51 Wis. 31; s. c. 7 N. W. Rep. 781; *Chew v. Hyman*, 10 Biss. C. C. 240; *Lloyd v. Waite*, 1 Phil. 61; *Pym v. Bowerman*, 3 Swan. 241.

<sup>1</sup> *Stark v. Brown*, 12 Miss. 572; s. c. 78 Am. Dec. 762.

<sup>2</sup> 112 Ill. 568.

<sup>3</sup> 1 Vern. 182.

<sup>4</sup> See: *Ante*, § 937; *Post*, § 931.

<sup>5</sup> 3 Swanst 237.

<sup>6</sup> 9 John. (N. Y.) 611.

<sup>7</sup> See: *Post*, § 931.

ises,<sup>1</sup> or any part thereof,<sup>2</sup> where derived through or in privity with the mortgagor, or holding a legal or equitable lien on the mortgaged premises, or any part thereof,<sup>3</sup> may redeem.

§ 960. **Holder of interest in mortgaged premises.**—The general rule in this country is that any one who has an interest in the mortgaged lands, in privity with the mortgagor, and who would suffer loss by foreclosure, may redeem from the lien of the mortgagor.<sup>4</sup> But, it has been said that the holder of a tax title has no right to redeem lands, embraced in his deed, from a mortgage thereon held in trust for a minor.<sup>5</sup> And a party who furnishes material for the building of a house, but does not follow the directions of the mechanics' lien law, has no lien on the premises entitling him to redeem a mortgage made thereon, nor does he acquire any interest in the premises by reason of his recovery of judgment against the mortgagor after foreclosure and sale.<sup>6</sup>

But to entitle such person to redeem his interest must be derived, either mediately or immediately, from or through, or in the right of the mortgagor, and in fact constitute a part of the mortgagor's original right of redemption.<sup>7</sup>

§ 961. **Holder of easement in mortgaged premises.**—It is said by the supreme judicial court of Massachusetts, in the case of *Bacon v. Bowdoin*,<sup>8</sup> that a person having an easement only in the land under mortgage, may redeem.

§ 962. **Holder of a part of mortgaged premises.**—The holder of a portion of mortgaged premises, not made a party to a mortgage foreclosure proceeding,

<sup>1</sup> See: *Post*, § 959.

<sup>2</sup> See: *Post*, § 962.

<sup>3</sup> See: *Ante*, § 945, *et seq.*

<sup>4</sup> *Smith v. Austin*, 9 Mich. 475. See: *Scott v. Henry*, 13 Ark. 112; *Farnum v. Metcalf*, 62 Mass. (8 Cush.) 46; *Platt v. Squire*, 53 Mass. (12 Met.) 494; *Millard v. Truax*, 50 Mich. 343; s. c. 15 N. W. Rep. 501; *Boquet v. Coburn*, 27 Bosw. (N. Y.)

230; *Pearce v. Morris*, L. R. 5 Ch. App. 227.

<sup>5</sup> *Witt v. Mewhirter*, 57 Iowa 545; s. c. 10 N. W. Rep. 890.

<sup>6</sup> *Eaton v. Bender*, 1 Neb. 426.

<sup>7</sup> *Smith v. Austin*, 9 Mich. 475. See: *Millard v. Traux*, 50 Mich. 343; s. c. 15 N. W. Rep. 501.

<sup>8</sup> 39 Mass. (22 Pick.) 401.

is entitled to redeem from the sale made thereunder.<sup>1</sup> The supreme court of the United States, in the case of *Villa v. Rodriguez*,<sup>2</sup> say that one who holds a portion of the title by deed from a part of the mortgagors is clothed with their rights, and is entitled to redeem such portion upon paying a proper proportion of the mortgage debt and interest; but the weight of decision, and the better doctrine, is thought to be that the owner of a portion of the mortgaged premises can not redeem without paying the whole mortgaged debt.<sup>3</sup> It is thought that the mortgagee is not obliged to accept a tender of the amount due on the mortgage from one who holds but a moiety of the equity of redemption, and when there is a dispute as to the title to the equity, in redemption and discharge of the whole mortgage.<sup>4</sup> In those cases where one of several owners redeems the mortgaged premises he thereby becomes substituted, in equity, in the place of the mortgagee, and is entitled to hold the land as if the mortgage existed, until the other owners repay to him their shares of the incumbrance; he in effect becomes the assignee of the mortgagee, for the purpose of enabling him to obtain the whole title to the land,

<sup>1</sup> *Green v. Dixon*, 9 Wis. 532. See: *Lowrey v. Byers*, 80 Ind. 443; *Bogut v. Colburn*, 27 Barb. (N. Y.) 230; *re Willard*, 5 Wend. (N. Y.) 94; *Pearce v. Morris*, L. R. 8 Eq. 217.

In the case of *Lowrey v. Byers*, 80 Ind. 443, A and B bought land, giving their joint notes and mortgage for the purchase-money, and agreed that each should pay one half of such money, and own one undivided half of the land. A paid his half. The holder of the last note, still unpaid, had the land sold to satisfy his judgment. C, the holder of a judgment against B, which was a junior lien on the land, redeemed the land from the sale. The court held that A might redeem from C.

<sup>2</sup> 79 U. S. (12 Wall.) 323; s. c.

*sub nom.* *Alexander v. Rodriguez*, bk. 20 L. ed. 406.

<sup>3</sup> *Street v. Beal*, 16 Iowa 68; s. c. 85 Am. Dec. 504; *Rowell v. Jewett*, 73 Me. 365; *Johnson v. Candage*, 31 Me. 28; *Smith v. Kelly*, 27 Me. 237; s. c. 46 Am. Dec. 595; *Osibson v. Crehore*, 22 Mass. (5 Pick.) 146; *Taylor v. Porter*, 7 Mass. 355; *Lowrey v. Byers*, 80 Ired. (N. C.) 443; *Hubbard v. Ascutney Mill Dam Co.*, 20 Vt. 402; s. c. 50 Am. Dec. 41.

<sup>4</sup> *Rowell v. Jewett*, 73 Me. 365.

**Interest does not stop at the date of the tender** when refused under such circumstances. Nor will interest stop when it appears that the person making the tender had the use and benefit of the money tendered from and after the time when it was made. *Rowell v. Jewett*, 73 Me. 365.

if the other owners decline to contribute their respective shares towards the removal of the incumbrance.<sup>1</sup>

§ 963. **Holder of bond to convey can not redeem.**—It is said by the supreme judicial court of Massachusetts, in the case of *McDougald v. Capron*,<sup>2</sup> that a bond for the conveyance of land upon the performance of certain conditions does not give the obligee a sufficient title to enable him to maintain a bill in equity against a mortgagee for the redemption of a prior mortgage thereon. It is otherwise, however, where a person is in possession of land under a contract to purchase. Chancellor Walworth, in the case of *Lowry v. Tew*,<sup>3</sup> says: "It is true a party who has gone into possession of premises under an agreement to purchase the same is, at law, a tenant at will to the holder of the legal right. But if he is under a written agreement, made by the owner, to sell and convey the premises to him, or under a parol agreement which has been so far consummated as to entitle him to a specific performance, he is in equity considered as the owner of that title for which he contracted, and which the vendor is to give him. And if, that is an equity of redemption he has the same claim to redeem, except as to *bona fide* purchasers without notice of his equitable rights, as if the equity of redemption had been conveyed to him at the time his equitable rights accrued to him under the contract."

§ 964. **Married woman mortgaging own property for husband's debt.**—In those cases where a married woman gives a deed of her property, absolute in form, to secure the debt of her husband, the grantee giving back a bond for conveyance to the husband, upon the husband's failure to pay the debt or redeem, the wife may redeem.<sup>4</sup>

§ 965. **Mortgagee, junior, may redeem.**—A junior mortgagee or other junior lienor, has a right to redeem from a prior

<sup>1</sup> *Howard v. Ascutney Mill Dam Co.*, 20 Vt. 402; s. c. 50 Am. Dec. 41.

<sup>2</sup> 73 Mass. (7 Gray) 273.

<sup>3</sup> 3 Barb Ch. (N. Y.) 407, 414.

<sup>4</sup> *Brighton v. Doyle*, 64 Vt. 616; s. c. 25 Atl. Rep. 694.



lien,<sup>1</sup> even though the decree for the foreclosure of such prior

<sup>1</sup> *Fink v. Murphy*, 21 Cal. 108; s. c. 81 Am. Dec. 149. See: *Wiley v. Ewing*, 47 Ala. 418; *Black v. Gerichten*, 58 Cal. 28; *Horn v. Jones*, 28 Cal. 194; *Tuolumme Redemption Company v. Sedgwick*, 15 Cal. 516; *Gamble v. Voll*, 15 Cal. 507; *Kirkham v. Dupont*, 14 Cal. 559; *Bridgeport Savings Bank v. Eldredge*, 28 Conn. 556; s. c. 73 Am. Dec. 688; *Harrison v. Wise*, 21 Conn. 1; s. c. 63 Am. Dec. 151; *Whitehead v. Hall*, 148 Ill. 253; s. c. 35 N. E. Rep. 871; *Rogers v. Herron*, 92 Ill. 583; *Morse v. Smith*, 83 Ill. 396; *Hodgen v. Guttery*, 58 Ill. 431; *Catterlin v. Armstrong*, 79 Ind. 514; *Hosford v. Johnson*, 74 Ind. 479; *Hasselmann v. McKernan*, 50 Ind. 441; *Skinner v. Young*, 80 Iowa 234; s. c. 45 N. W. Rep. 889; *Smith v. Shay*, 62 Iowa 119; s. c. 17 N. W. Rep. 444; *Tuttle v. Dewey*, 44 Iowa 306; *McHenry v. Cooper*, 27 Iowa 137; *Anson v. Anson*, 20 Iowa 55; s. c. 89 Am. Dec. 514; *Knowles v. Rablin*, 20 Iowa 101; *Street v. Beal*, 16 Iowa 68; s. c. 85 Am. Dec. 504; *White v. Hampton*, 13 Iowa 259; *Heimstreet v. Winney*, 10 Iowa 430; *Cooper v. Martin*, 1 Dana (Ky.) 24; *Pritchard v. Kallamazoo College*, 82 Mich. 587; s. c. 47 N. W. Rep. 31; *Case Threshing Machine Co. v. Mitchell*, 74 Mich. 679; s. c. 42 N. W. Rep. 151; *Lamb v. Jeffrey*, 41 Mich. 419; s. c. 3 N. W. Rep. 204; *Gatz v. Toles*, 40 Mich. 725; *Sager v. Tupper*, 35 Mich. 134; *Avery v. Ryerson*, 34 Mich. 362; *Bovey De Laitre Lumber Co. v. Tucker*, 48 Minn. 223; s. c. 50 N. W. Rep. 1038; *Tinkcom v. Lewis*, 21 Minn. 132; *Wilson v. Vanstone*, 112 Mo. 315; s. c. 20 S. W. Rep. 612; *Reynard v. Brown*, 7 Neb. 449; *Lambert-*

*ville National Bank v. McCready Bag & Paper Co.* (N. J. Ch. 1888), 15 Atl. Rep. 388; s. c. 13 Cent. Rep. 388; 1 L. R. A. 334; *Hill v. White*, 1 N. J. Eq. (1 Saxt.) 435; *Benton v. Hatch*, 122 N. Y. 329; s. c. 25 N. E. Rep. 486; *Clark v. Mackin*, 95 N. Y. 351; *Tombly v. Cassidy*, 82 N. Y. 155; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; *Pardee v. McAnken*, 3 Barb. (N. Y.) 534; *Jenkins v. Continental Insurance Co.*, 12 How. (N. Y.) Pr. 66; *Denton v. Ontario County National Bank*, 18 N. Y. Supp. 35; s. c. 44 N. Y. S. R. 33; *Dings v. Parshall*, 14 N. Y. Supr. 522; *Bloomington v. Barnard*, 14 N. Y. Sup'r. 460; *Campbell v. McElevey*, 2 Disn. (Ohio) 574; *Hoven-den v. Knott*, 12 Oreg. 267; s. c. 7 Pac. Rep. 30; *Chavener v. Wood*, 2 Oreg. 182; *Maloney v. Earheart*, 81 Tex. 281; s. c. 16 S. W. Rep. 1030; *Walker v. King*, 44 Vt. 601; *Downer v. Wilson*, 33 Vt. 1; *Farwell v. Murphy*, 2 Wis. 533; *Lauriat v. Stratton*, 6 Sawy. C. C. 339; *Flynt v. Howard*, (1893) 2 Ch. 54; *Smith v. Green*, 1 Coll. 550; *Ramsbottom v. Wallis*, 5 L. J. N. S. Ch. 92; *Palk v. Clinton*, 12 Ves. 59; s. c. 8 Rev. Rep. 283.

In Alabama, Code 1886, § 1879, the right of redemption is confined to the persons upon whom it is expressly conferred. Junior mortgagees and assignees not being mentioned cannot redeem. *Commercial Real Estate & B. Association v. Parker*, 84 Ala. 298; s. c. 4 So. Rep. 268; *Aiken v. Bradford*, 84 Ala. 395; s. c. 4 So. Rep. 266; *Powers v. Andrews*, 84 Ala. 289, overruling *Bailey v. Timberlake*, 74 Ala. 221.

In the case of *Powers v. Andrews*, *supra*, the court say: "The statutory right of redemption, on the con-

lien directs the payment of the junior lien out of any surplus

trary, comes into existence only after the equity of redemption proper has been cut off by sale or foreclosure. Until then, it would seem, it cannot spring into life. And we have uniformly decided that this privilege is neither property, nor the right of property; that it is not subject to levy or sale as such under execution; and that it is a right or privilege personal to the debtor. *Parmer v. Parmer*, 74 Ala. 285; *Otis v. McMillan*, 70 Ala. 46, 62; *Childress v. Monette*, 54 Ala. 317; *Mewburn v. Bass*, 82 Ala. 626, 2 So. Rep. 520; *Cooper v. Hornsby*, 71 Ala. 62; *Seals v. Pheiffer*, 77 Ala. 278. It necessarily follows from these principles, which are now too well settled to be disturbed, that the statutory right of redemption can only be exercised by persons named in the statute, in the mode, within the time, and upon the conditions therein prescribed, although in construing the statute it must be interpreted liberally in favor of the debtor, to prevent the oppressive sacrifice of his estate. The statute itself provides, in detail and very fully, for the mode in which the right may be exercised, and the circumstances which authorize it, and the remedy for enforcing it. The right is conferred only on the following named classes of persons: (1) The debtor himself; (2) any judgment creditor of the debtor whose judgment has not been obtained by fraud, collusion or confession; (3) the executor or administrator of the debtor; (4) the heirs or devisees of the debtor; (5) the executor or administrator of any judgment creditor of the debtor; (6) a child who was the grantee of his parent, who owned the land sold. Code 1886, §§ 1879, 1883, 1887, 1891."

In the case of *Wiley v. Ewing*, 47 Ala. 418, it is said that where a debtor executes two or more mortgages on the same tract of land at different times to different persons, and for security for different debts, the junior mortgagee has a right to redeem from the senior mortgagee by paying his debt with interests and costs. This right is held to be independent of the statutory right given to judgment creditors; it applies generally to deed of trust to secure the payment of debts and to mortgages proper.

In California a junior mortgagee who is not made a party to a suit for foreclosure of a prior mortgage, has a statutory right of redemption within six months from the date of the sale made under the decree in such suit; and has also the general equitable right of redemption which exists independently of the statute. If made a party to the foreclosure suit, his equitable right of redemption is barred, but he redeems under the statute. See: *Black v. Gerichten*, 58 Cal. 56; *Horn v. Jones*, 28 Cal. 194; *Fink v. Murphy*, 21 Cal. 108; *Tuolumme Redemption Co. v. Sedgwick*, 15 Cal. 516; *Gamble v. Voll*, 15 Cal. 507; *Kirkham v. Dupont*, 14 Cal. 559.

In Connecticut when second mortgagee applies to redeem prior mortgage, he stands in the same situation as the mortgagor, and is entitled to the benefit of all payments made by him, and of all rents received by the prior mortgagee, and is not bound to pay any greater sum than the mortgagor would have had to pay if the application had been made by him. *Harrison v. Wyse*, 24 Conn. 1; s. c. 63 Am. Dec. 151.

In those cases where second mort-

remaining after satisfaction of the prior lien, for his statu-

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gagees have acquired by foreclosure the right to redeem mortgaged premises have such right after the time allowed for redemption has expired, notwithstanding a decree of foreclosure obtained without service of process or legal notice to them, by the defendants, who by purchase represents the interests of the first mortgage. *Bank v. Eldredge*, 28 Conn. 558; s. c. 73 Am. Dec. 688.

In Illinois, a junior mortgagee may redeem from the first mortgage, and have the property sold on foreclosure, without regard to a conveyance of the mortgagor's equity of redemption, made to the first mortgagee, after the execution of the junior mortgage. *Rogers v. Herron*, 92 Ill. 583.

In those cases where there has been a foreclosure proceeding by the prior mortgagee, and the subsequent mortgagee has not been served with process, he is entitled to redeem from the sale foreclosing the first mortgage, and the purchaser under such a sale takes the premises subject to the junior mortgagee's right of redemption. See: *Morse v. Smith*, 83 Ill. 396; *Hodgen v. Guttery*, 58 Ill. 431.

It is held, in the recent case of *Whitehead v. Hall*, 148 Ill. 253; s. c. 35 N. E. Rep. 871, that a junior mortgagee of an equity of redemption is not deprived of the right to redeem within fifteen months as a "decree creditor" under Ill. Rev. Stat. c. 77, § 20, by the fact that he is a party to the foreclosure of the senior mortgage, and was, by the decree, allowed to redeem within twelve months, as such decree applies to his right to redeem solely as a junior mortgagee, and not as a decree creditor.

In Indiana, where a mortgage has

been foreclosed by the senior mortgagee, without making the junior mortgagee a party to the foreclosure suit, and the latter brings a bill against the purchaser to redeem, he is required to pay the amount of the first mortgage, and attorney's fees when provided for therein, and also amounts paid for insurance by the senior mortgagee on neglect of the mortgagor to keep the premises insured as required by the mortgage, but he is not bound to pay the costs of the foreclosure suit. *Hosford v. Johnson*, 74 Ind. 479.

In those cases where the holder of a junior mortgage has foreclosed his mortgage without making the senior mortgagee a party to the suit, and who has bought in the premises on sale under the decree, has a right to redeem the mortgaged premises from the senior mortgagee, though the senior mortgagee may have foreclosed his mortgage previously, without making the holder of the junior mortgage a party to the suit, even though the premises have been sold by the sheriff on the decree and bought in by the senior mortgagee. See: *Catterlin v. Armstrong*, 79 Ind. 514; *Hasselmann v. McKernan*, 50 Ind. 441.

In Iowa, the holder of a junior mortgage, who is made defendant in a suit for the foreclosure of the senior mortgage, can redeem, after sale, by paying the amount bid, with interest, within the time allowed by statute, notwithstanding the amount bid by the senior mortgagee at the sale is less than the amount of the mortgage debt. *Tuttle v. Dewey*, 44 Iowa 306.

The rule that a junior mortgagee, not made party to foreclosure proceedings of a senior mortgagee, who has both actual and constructive no-

tory right to redeem still exists as to any portion of

tice of the rights of the former, may foreclose against the mortgagor, or redeem from the first mortgagee or his assignee or the purchaser at the foreclosure sale, is not changed by statute in Iowa. *Anson v. Anson*, 20 Iowa 55; s. c. 89 Am. Dec. 514.

But where such junior mortgagee seeks to redeem a portion of the property sold on the foreclosure of the senior mortgagee, he must tender the amount of the entire mortgage debt. See: *Knowles v. Rabbin*, 20 Iowa 101; *Smith v. Shay*, 62 Iowa 119; s. c. 17 N. W. Rep. 444; *Street v. Beal*, 16 Iowa 68; s. c. 85 Am. Dec. 504; *White v. Hampton*, 13 Iowa 259; *Heimstreet v. Winnie*, 10 Iowa 430.

**Same**—After his debt has been fully satisfied, a junior mortgagee has no right to redeem from a prior sale under foreclosure of a senior mortgage to which he was not a party. *McHenry v. Cooper*, 27 Iowa 137.

In **Kentucky**, a junior mortgagee or incumbrancer, or the holder of the equity of redemption, not made a party to the foreclosure proceedings, is not barred by the decree, and will be allowed to redeem the estate, even though the senior mortgagee had no notice of such claim. But if he is made a party to the action, and fails to defend, he will be barred. *Cooper v. Martin*, 1 Dana (Ky.) 24.

In **Michigan**, the subsequent mortgagee of a portion of the premises included in the first mortgage, the other portion of which has been conveyed, may be permitted to redeem from the first mortgage, and be subrogated to all rights therein. *J. I. Case Threshing Mach. Co. v. Mitchell*, 174 Mich. 679; s. c. 42 N. W. Rep. 151.

It is said, in *Pritchard v. Kalama-*

*zoo College*, 82 Mich. 587; s. c. 47 N. W. Rep. 31, that an assignee of a recorded second mortgage, although failing to record his assignment until after the first mortgagee, without actual knowledge of the assignment and on the faith of the record and the representation of the second mortgagee, to whom, subsequent to the assignment, the mortgagor conveyed the land, that his mortgage had been extinguished by merger, released his first mortgage and took a third mortgage on the land for the unpaid principal and interest due on the first,—is, where he records his assignment before commencement of proceedings to foreclose the third mortgage, to which he is not made a party, entitled to redeem.

**Same**—A second mortgagee has a right to redeem a prior mortgage, and this right cannot be cut off or prejudiced by arrangements between the holder of the first mortgage and the mortgagor, for an extension of time to pay it. *Lamb v. Jeffrey*, 41 Mich. 419; s. c. 3 N. W. Rep. 204; *Sager v. Tupper*, 35 Mich. 134.

Such mortgagee's right cannot be affected by a foreclosure decree and sale under the prior mortgage, where, at the time of such decree and sale, no party to the foreclosure suit in any way represented, or had any right or interest in, such subsequent mortgage, *Avery v. Ryerson*, 34 Mich. 362.

But his right to redeem is barred if he allows the foreclosure to become absolute. *Gantz v. Toles*, 40 Mich. 725.

In **Minnesota** it is said that when, upon foreclosure by advertisement of a mortgage embracing two parcels of land, such parcels have been separately sold to the mortgagee, at a separate

his demand not satisfied by the application of such

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price for each, a junior mortgagee of one of the parcels can redeem from the sale that parcel only which is embraced in his mortgage. The rule is the same when such junior mortgagee has foreclosed his mortgage by advertisement, and has purchased, at the foreclosure sale, the parcel embraced in his mortgage. *Tinkcom v. Lewis*, 21 Minn. 132.

In *Missouri* the right of the holder of a junior mortgage to redeem before the foreclosure of a senior mortgage is not affected where the mortgagee in the senior mortgage purchases the equity of redemption. *Wilson v. Vanstone*, 112 Mo. 315; s. c. 20 S. W. Rep. 612.

In *Nebraska* it is held that the right of a junior incumbrancer who was not made a party to a suit to foreclose a mortgage is to redeem the senior incumbrancer, not to redeem the land. The owner of the fee redeems the land itself. The junior incumbrancer is not entitled to the estate, but to an assignment of the securities. *Renard v. Brown*, 7 Neb. 449.

In *New Jersey* any subsequent mortgagee may redeem a first mortgage and bring all the land to a sale under the same decree, and thus enable the court to marshal the fund, and hence cannot require an intermediate mortgagee to take any particular step toward so doing. *Lambertville Nat. Bank v. McCready Bag & Paper Co.* (N. J. Ch. 1888), 15 Atl. Rep. 388; 13 Cent. 388, 1 L. R. A. 334.

In *Hill v. White*, 1 N. J. Eq. (1 Saxt.) 435, where the first mortgagee purchased the mortgaged premises at a sheriff's sale, took possession and received the rents and

profits, the second mortgagee was allowed to redeem, upon paying the principal and interest of the first mortgage, together with the costs incurred in obtaining possession, and deducting therefrom what with reasonable diligence, might have been received by the first mortgagee while in possession of rents and profits.

In *New York* a junior mortgagee may, either by payment or tender of the amount due, redeem premises from the lien of a senior mortgage. *Dings v. Parshall*, 14 N. Y. Supr. 522. See: *Bloomington v. Barnard*, 14 N. Y. 460. In those cases where a junior mortgagee who has not been made a party to the foreclosure of a prior mortgage is entitled in redeeming therefrom to all the rights which he might have asserted in the foreclosure suit had he been made a party. *Denton v. Ontario County Nat. Bank*, 44 N. Y. S. R. 33; s. c. 18 N. Y. Supp. 38.

In *Oregon* the code provides that subsequent incumbrancers must be made parties thereto, and that the decree therein shall ascertain and determine the amount and priority of the liens of all such parties, and direct that the premises be sold and the proceeds applied to the satisfaction of the debts secured thereby in the order specified therein; and that process to enforce such decree should issue upon the joint application of the parties or the order of the court. The court held that a sale in pursuance of such decree was a sale upon the process of each of the lien creditors provided for in the decree, that it extinguished their liens, and that therefore neither of them had a right to redeem the premises from the purchaser at such



surplus.<sup>1</sup> But in Indiana it is held that a junior mortgagee who is made defendant in a suit to foreclose the senior mortgage, and whose lien is provided for in the decree which directs a sale of the property and a distribution of the proceeds among all the lien-holders in the order of priority, cannot redeem from the sale under statutes which do not permit a judgment creditor to redeem from his own sale.<sup>2</sup>

sale under § 297 of the Code, which gives the right of redemption only to a creditor having a lien upon the property sold. *Lauriat v. Stratton*, 6 Sawy. C. C. 339.

**Same**—Such subsequent incumbrancers must be made parties, and that the decree in a suit to enforce the lien shall ascertain the amount and privity of the liens of all such parties, and direct that the premises be sold and the proceeds applied to the satisfaction of the debts secured thereby in the order specified therein. *Hovenden v. Knott*, 12 Oreg. 267; s. c. 7 Pac. Rep. 30; *Chavener v. Wood*, 2 Oreg. 182; *Lauriat v. Stratton*, 6 Sawy. C. C. 339; Oreg. Civ. Code, §§ 410, 414.

In Texas, under Rev. Stat. art. 2980, invalidating the whole rate of interest on a usurious contract, a junior mortgagee or a purchaser under the mortgage may redeem from a prior usurious incumbrance by paying only so much of the debt as is recognized by law. *Maloney v. Earheart*, 81 Tex. 280; s. c. 16 S. W. Rep. 1030.

In Vermont a subsequent mortgagee permitting the grantor of the mortgage to remain in possession, has no greater claim than he would have had if the mortgagor had remained in possession, and must stand upon his rights under his own mortgage. *Walker v. King*, 44 Vt. 601; *Downer v. Wilson*, 33 Vt. 1.

In Wisconsin it is held that the

assignee of a second mortgage may maintain a bill for redemption against the assignee of a first mortgage, or he may, in a bill of foreclosure, make the assignee of the first mortgage a party and obtain the usual decree of redemption against him. *Farwell v. Murphy*, 2 Wis. 533.

In England second mortgagee of real estate and a reversionary interest in personalty as security for a debt, and takes a third mortgage of the real estate only for another debt, and transfers the latter mortgage to the holder of a first mortgage on both the real estate and personalty, and at the same time releases the real estate from the second mortgage, is entitled to redeem both the personalty and real estate on payment of the sum secured by the first mortgage, to be apportioned between the real estate and the personalty according to their respective values, and is entitled to have a conveyance of the personalty absolutely, and of the real estate to be held as security for such part of the money paid as shall be apportioned to it. *Flint v. Howard* (C. A.) (1893), 2 Ch. 54.

See: *Smith v. Green*, 1 Coll. 555; *Ramsbottom v. Wallis*, 5 L. J. N. S. Ch. 92; *Palk v. Clinton*, 12 Ves. 59; s. c. 8 Rev. Rep. 283.

<sup>1</sup> *Frink v. Murphy*, 21 Cal. 108; s. c. 81 Am. Dec. 149.

<sup>2</sup> *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381; s. c. 25 N. E. Rep. 558; 9 L. R. A. 676.

The fact that the junior mortgagee gives only a nominal consideration,<sup>1</sup> or no consideration at all,<sup>2</sup> does not affect the junior mortgagee's right to redeem. And it is said by the supreme court of Illinois, in the case of *Morse v. Smith*,<sup>3</sup> that a mortgagee of several tracts of land, a portion of which are subject to a prior mortgage, has a right to redeem from a sale under such prior mortgage, without showing that it is necessary to protect the security of his mortgage debt, and that the other tracts in his mortgage are not of sufficient value to pay his mortgage debt. The reason for this rule is the fact that the mortgagee is under no obligation to take any risk as to the adequacy of his security. In the case of *Campbell v. McElevey*<sup>4</sup> it is said that a mortgagee of a leasehold will be permitted to redeem the premises from forfeiture, and the sum he pays in such case will be a preferable charge, in redemption account, against the lessee and all claiming under him.

The supreme court of Alabama, in the case of *Owen v. Kilpatrick*,<sup>5</sup> say that a mortgage, can not redeem the mortgaged land from one who has himself redeemed it from the purchaser at a sale to foreclose a vendor's lien, under the statute of that state<sup>6</sup> permitting one judgment creditor to redeem from another upon tender or payment of the amount given by the latter, and ten per cent. per annum interest thereon. And it is said in the case of *Whipperman v. Dunn*,<sup>7</sup> that a mortgagee who assigns all his interest in the certificate of purchase of the mortgaged premises at a sale

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<sup>1</sup> In the case of *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223; s. c. 50 N. W. Rep. 1038, the mortgagee in a mortgage for \$2 made by the owner of lands sold under a prior mortgage, on the last day for redemption by him, acquires the right to file notice and redeem from the sale.

<sup>2</sup> In *Skinner v. Young*, 80 Iowa, 234; s. c. 45 N. W. Rep. 889. it is said that a mortgagee who gave no consideration for the mortgage, and who assigned it as security for a debt

of the mortgagor to the assignee, has no interest which will authorize a redemption of property of the mortgagor sold under another mortgage, unless by reason of payments made to the holder of the mortgage which had been assigned.

<sup>3</sup> 83 Ill. 396.

<sup>4</sup> 2 Disn. (Ohio) 574.

<sup>5</sup> 96 Ala. 42; s. c. 11 So. Rep. 476.

<sup>6</sup> Ala. Code. § 1385.

<sup>7</sup> 124 Ind. 349; s. c. 24 N. E. Rep. 166.

under foreclosure is thereby divested of all title to the debts secured or intended to be secured by the mortgage; and he cannot thereafter maintain an action to reform the mortgage.

§ 966. **Same—Senior may not redeem.**—A senior mortgagee, even though he has barred all other interests by a foreclosure, is not entitled to redeem the mortgaged premises from a purchaser under foreclosure of a junior mortgage, but he may take out a precept and sell the land to satisfy his decree, regardless of the previous sale.<sup>1</sup>

§ 967. **Mortgagor may redeem.**—The mortgagor has the paramount and absolute right to redeem the mortgaged premises from the mortgage at any time before the sale thereof;<sup>2</sup> and after a sale made in all those cases where he has not been made a party to the foreclosure proceedings, and he has not parted with his interest in the mortgaged premises,<sup>3</sup> lost it by laches, or it is barred.<sup>4</sup>

<sup>1</sup> Goodman v. White, 26 Conn. 317; Dawson v. Overmeyer, 141 Ind. 348; s. c. 40 N. E. Rep. 1065.

<sup>2</sup> Wylie v. Welch, 51 Wis. 351; s. c. 8 N. W. Rep. 207. See: *Ante*, § 942.

<sup>3</sup> A mortgagor who has conveyed the lands to third person cannot exercise any election as to redemption from foreclosure sale. American Freehold Land Mortg. Co. v. Sewell, 92 Ala. 163; s. c. 9 So. Rep. 143; 13 L. R. A. 299; Miller v. Green, 138 Ill. 565; s. c. 28 N. E. Rep. 837, aff'g 37 Ill. App. 631.

But an owner of land who, after conveying it by deed of trust to secure debts, conveys it in fee subject to the trust deed, expressly reserving a lien for the purchase money, or his administrator, can redeem from foreclosure of the deed of trust. Percy v. Tate 91 Tenn. 478; s. c. 19 S. W. Rep. 323.

A mortgagor who voluntarily conveys the premises to the mortgagee in full satisfaction of the mortgage debt will not be allowed to assert an equity of redemption after the property has greatly appreciated in value in the mortgagee's hands, merely because his notes, although canceled, are not surrendered to him. Miller v. Green, 37 Ill. App. 631, aff'd in 138, Ill. 565; s. c. 28 N. E. Rep. 837.

<sup>4</sup> See: Hall v. Arnott, 80 Cal. 348; s. c. 22 Pac. Rep. 200; Randall v. Duff, 79 Cal. 115; s. c. 19 Pac. Rep. 532; 3 L. R. A. 754; 21 Pac. Rep. 610; Benham v. Rowe, 2 Cal. 387; s. c. 56 Am. Dec. 342; Colwell v. Warner, 36 Conn. 224, 232; Walker v. Carlton; 97 Ill. 532; Harms v. Palmer, 61 Iowa 483; s. c. 16 N. W. Rep. 574; Tetrault v. Labbe, 155 Mass. 497; s. c. 30 N. E. Rep. 173; Merritt v. Hosmer, 77 Mass. (11 Gray) 276; s. c. 71 Am. Dec. 713; Wilson v. Troup, 2 Cow. (N. Y.)

This right of the mortgagor, or those claiming under him, is not affected or prejudiced by the fact that there is no judgment for deficiency;<sup>1</sup> the mortgagee has foreclosed for more than is due;<sup>2</sup> has purchased the mortgaged premises under a power in the mortgage;<sup>3</sup> has conveyed the mortgaged premises in whole or in part,<sup>4</sup> or is a tenant in common with the mortgagor. He will be required to pay the

195; s. c. 14 Am. Dec. 458; *Graves v. Hampden Fire Ins. Co.*, 92 Mass. (10 Allen) 281; *Parks v. Allen*, 42 Mich. 482; s. c. 4 N. W. Rep. 227; *Dickerson v. Hayes*, 26 Minn. 100; *Thompson v. Foster*, 21 Minn. 319; *Hall v. Hall*, 46 N. H. 240; *Pearcy v. Tate*, 91 Tenn. 478; s. c. 19 S. W. Rep. 323; *Ward v. Seymour*, 51 Vt. 320; *Wylie v. Welch*, 51 Wis. 351; s. c. 8 N. W. Rep. 207.

In *Walker v. Carlton*, 97 Ill. 582, A agreed to lend B \$5,000 to be secured by note on six months and deed of trust, which were prepared, delivered, and the deed of trust recorded, and a warrant of attorney given to confess judgment. On the day following, B went to A for the money, but received \$3,000 only for which he gave a note on thirty days, and a warrant of attorney to confess judgment thereon. After eight months B having paid nothing, the land was sold under the trust deed, the notice of sale stating that the \$5,000 note was held as collateral security for the \$3,000 note, and A bid in the premises for \$2,600. Eight months later, B filed his bill to set aside the sale, and to redeem upon payment of \$3,000. The court, by a majority opinion, held that he was entitled to redeem.

**Mortgage deed provided that the mortgagor should keep the premises insured for the mortgagee's benefit. The mortgagor**

accordingly procured insurance thereon, the policy providing that no sale of the property should affect the right of the mortgagee to recover in case of loss. After the assignment by the mortgagor of his interest, a loss occurred. The insurance company paid the amount of the policy to the mortgagee, and took from him an assignment of the mortgage and policy. The court held that the holder of the equity of redemption might redeem upon paying to the insurance company the balance due upon the mortgage over and above the amount due upon the policy. *Graves v. Hampden, &c., Ins. Co.*, 92 Mass. (10 Allen) 281.

<sup>1</sup> Thus it is said in *Hall v. Arnott*, 80 Cal. 348; s. c. 22 Pac. Rep. 200, that since the adoption of California Civil Code, § 726, a mortgagee who forecloses a deed absolute in form, but in fact only a mortgage, without at the same time foreclosing another deed given to secure the same indebtedness, but upon different property, not being entitled to a personal judgment for deficiency, the right of the mortgagor is not affected by the fact that no judgment for deficiency has been docketed.

<sup>2</sup> *Dickerson v. Hayes*, 26 Minn. 108; s. c. 1 N. W. Rep. 834.

<sup>3</sup> *Benham v. Rowe*, 2 Cal. 387; s. c. 56 Am. Dec. 342.

<sup>4</sup> *Wilson v. Troup*, 2 Cow. (N. Y.) 195; s. c. 14 Am. Dec. 458.

full amount due;<sup>1</sup> will not be chargeable with rent,<sup>2</sup> and will not be entitled to an account of the rents and profits during his occupation, where he, after entry for breach of condition, occupies the mortgaged premises under an agreement to pay a stipulated rent, which he neglects to do.<sup>3</sup>

And the owner of an equity, who is out of possession, may bring a bill in equity to redeem against the mortgagee and the tenant in possession, notwithstanding the pendency of a suit at law between the mortgagee and tenant for the possession.<sup>4</sup>

In those cases where the mortgaged land has been conveyed without consideration, though by conveyance purporting to be for a valuable consideration, under a power of attorney to sell and convey, and the grantee gives a mortgage upon it, parties who have succeeded to the right of the original owner upon his death are entitled to redeem from the mortgage.<sup>5</sup> And a mortgagor's right of redemption is not barred where the mortgagee, immediately after the expiration of the time limited for payment by a decree in a suit to redeem, fixing the time and amount of payment, and enjoining the mortgagee from foreclosure until a further order, begins proceedings, without first procuring the dismissal of the bill to redeem, to foreclose under the power of sale in his mortgage, and purchases at his own sale.<sup>6</sup>

It has been said that the payment of a decree of foreclosure by a junior mortgagee operates as an assignment of the former mortgage to him, and leaves the mortgagor a

<sup>1</sup> See: *Post*, § 1050.

<sup>2</sup> *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276; s. c. 71 Am. Dec. 713.

<sup>3</sup> *Id.*

<sup>4</sup> *Hall v. Hall*, 46 N. H. 240.

<sup>5</sup> *Randall v. Duff*, 79 Cal. 115; s. c. 19 Pac. Rep. 532; 3 L. R. A. 734; 21 Pac. Rep. 610.

<sup>6</sup> *Tetrault v. Labbe*, 155 Mass. 173; s. c. 30 N. E. Rep. 173.

Where a bill to enforce the discharge of a mortgage had been

filed before the time for redemption had expired, but after foreclosure was begun, and it was held that the complainant mortgagor was not entitled to discharge, he was allowed to redeem on paying the amount of the debt with interest at the stipulated rate, and the costs of foreclosure, with interest, but without the attorney fee provided for in the mortgage. *Parks v. Allen*, 42 Mich. 482; s. c. 4 N. W. Rep. 227.



right of redemption.<sup>1</sup> But the supreme court of Connecticut, in the case of *Colwell v. Warner*,<sup>2</sup> say that where a second mortgagee has foreclosed, and subsequently redeems the prior mortgage, as he has a right to do, paying the debt as his own, the mortgagor has no right to redeem the first mortgage, if his claim is resisted by the second mortgagee. The second mortgage conveys all the mortgagor's interest. The foreclosure removes the condition and converts the conveyance into an absolute one, though the thing conveyed remains the same. It seems, however, that where a part only of the mortgage debt is transferred, to collect which the transferee sells the land under foreclosure, and the mortgagee redeems, he does not thereby acquire any additional rights, and the mortgagor will be entitled to redeem on paying the amount for which the land was sold, with costs.<sup>3</sup>

§ 968. **Mortgagor and wife may redeem—When.**—The owner of a homestead is entitled to redeem the lien of a mortgage on the land occupied and set apart as such;<sup>4</sup> consequently a mortgagor and wife having a homestead, and she an inchoate right of dower in the premises,<sup>5</sup> they may maintain a bill to redeem, although not entitled to an assignment of the mortgage.<sup>6</sup>

§ 969. **Mortgagors—Joint—Redemption by.**—In the case of *Commercial Real Estate and Building Association v. Parker*,<sup>7</sup> it is held that one of two joint mortgagors cannot, without authority from the other, make an offer to redeem which will support an action for redemption by both.

§ 970. **Partner may redeem.**—The interest of a partner in lands mortgaged by the firm is sufficient to enable him to redeem from the mortgage under a statute<sup>8</sup> authorizing

<sup>1</sup> *Ward v. Seymour*, 51 Vt. 320.

<sup>2</sup> 36 Conn. 224, 232.

<sup>3</sup> *Harms v. Palmer*, 61 Iowa 483; s. c. 16 N. W. Rep. 574.

<sup>4</sup> *Butts v. Broughton*, 72 Ala. 294; *Kirby v. Reese*, 69 Ga. 452; *Erwin v.*

*Blanks*, 60 Tex. 583; *Cosborne v. Inglis*, 1 Ark. 606.

<sup>5</sup> See: *Post*, § 993.

<sup>6</sup> *Lamb v. Montague*, 112 Mass. 352.

<sup>7</sup> 84 Ala. 298; s. c. 4 So. Rep. 263.

<sup>8</sup> As Mass. Stat., 1877, c. 178.

redemption by the mortgagor or any person lawfully claiming or holding under him, full equity jurisdiction being conferred by the statute upon the court.<sup>1</sup>

The supreme judicial court of Massachusetts, in the case of *Emerson v. Atkinson*,<sup>2</sup> say that an unexecuted agreement to compromise, although it postpones the adjustment of the rights of the parties thereto, does not cut off the right of one of them in a suit against the other to establish a partnership, to redeem from mortgages held by other defendants, although the court may protect their rights by interlocutory orders as to the payment of the money on the mortgages, or may direct a sale under powers in the mortgage.

§ 971. Persons in interest not made parties.—We have heretofore seen that it is necessary to make parties to foreclosure proceedings all persons having an interest in the land in order to cut off their equity of redemption;<sup>3</sup> hence all parties interested in the premises, who were not served with process, may redeem from a sale under decree of foreclosure, just the same as if no such decree had been made.<sup>4</sup>

<sup>1</sup> *Emerson v. Atkinson*, 159 Mass. 356; s. c. 34 N. E. Rep. 516.

<sup>2</sup> 159 Mass. 356; s. c. 34 N. E. Rep. 516.

<sup>3</sup> See: *Ante*, § 116, *et seq.*

<sup>4</sup> *Wiley v. Ewing*, 47 Ala. 418; *Hodgen v. Guttery*, 58 Ill. 431; *Strang v. Allen*, 44 Ill. 422; *Smith v. Sinclair*, 10 Ill. 108; *Nesbit v. Hanway*, 87 Ind. 400; *Holmes v. Bybee*, 54 Ind. 262; *Bunce v. West*, 62 Iowa 80; s. c. 17 N. W. Rep. 179; *Gower v. Winchester*, 33 Iowa 303; *Pratt v. Freat*, 13 Wis. 462; *Murphy v. Farwell*, 9 Wis. 102; *Farwell v. Murphy*, 2 Wis. 533; *Noyes v. Hall*, 97 U. S. 34; bk. 34 L. ed. 909; *Thomson v. Dean*, 74 U. S. (7 Wall.) 342; s. c. *sub nom.* *Dean v. Nelson*, bk. 19. L. ed. 94.

In *Thomson v. Dean*, 74 U. S.

(7 Wall.) 342; s. c. *sub nom.* *Dean v. Nelson*, bk. 19 L. ed. 94, parties not notified of proceedings to foreclose, taken during the late civil war, while they were within the lines of the enemy, were allowed to redeem on condition of the payment of principal and interest in full.

The supreme court of Indiana, in the case of *Holmes v. Bybee*, 34 Ind. 262, say that under the statute of that state (2 Gav. & H. 251) providing for the redemption of real property sold on execution or order of sale, &c., does not cut off or affect any right of redemption existing by the general principles of law, and held by one who was not a party to the "judgment, decree, or other judicial proceedings," on which the sale was made.

§ 972. **Purchaser—Subsequent purchaser.**—Where a person takes a deed with notice of a prior mortgage under such circumstances that, as against such mortgage, he can not be regarded as a *bona fide* purchaser, he and his privies will be entitled to redeem from such mortgage,<sup>1</sup> and this right can be cut off only by a proper foreclosure,<sup>2</sup> by laches, estoppel *in pais*,<sup>3</sup> or barred in the regular way;<sup>4</sup> a decree of foreclosure in a suit to which such purchaser or his privies were not parties, will not affect the right of redemption.<sup>5</sup> But when subsequent purchasers or incumbrancers<sup>6</sup> file a bill in equity against the first mortgagee and a purchaser under him, asking an account and redemption, and not denying that there is a balance due on the mortgage debt, they must make a tender in the bill, or offer to pay whatever balance is found due.<sup>7</sup>

§ 973. **Same—Before foreclosure.**—A purchaser of the equity of redemption from the mortgagor prior to the institution of foreclosure proceedings, succeeds to all the rights of the mortgagor,<sup>8</sup> and where not made a party to the proceedings a foreclosure and sale of the mortgaged premises does not affect his right of redemption.<sup>9</sup> Such purchaser from the mortgagee, whether of the whole or only a portion of the mortgaged premises, must pay the whole

<sup>1</sup> Stone v. Welling, 14 Mich. 514.

<sup>2</sup> See: *Ante*, § 915.

<sup>3</sup> See: *Ante*, § 921.

<sup>4</sup> See: *Post*, c. XLVI.

<sup>5</sup> See: Smith v. Connor, 65 Ala. 371; Dunlap v. Wilson, 32 Ill. 518; Jackson v. Warren, 32 Ill. 335; Hurd v. Case, 32 Ill. 45; s. c. 83 Am. Dec. 249; Ohling v. Lintgens, 32 Ill. 24.

<sup>6</sup> See: *Post*, § 983.

<sup>7</sup> Smith v. Connor, 65 Ala. 371. See: *Post*, § 1078.

<sup>8</sup> Where a mortgagee entered upon land to foreclose a mortgage in which the mortgagor's wife had not joined, but did not take possession of the house, nor receive rent therefor, she having continued in possession of the

house, claiming it as a homestead, on a bill in equity to redeem, brought by an assignee of the equity of redemption, the court held that the mortgagee was not accountable for the rent of the house. Taft v. Stetson, 117 Mass. 471.

<sup>9</sup> Moore v. Anders, 14 Ark. 678; s. c. 60 Am. Dec. 537; Boggs v. Fowler, 76 Cal. 559; s. c. 76 Am. Dec. 561; Goodenow v. Ewer, 16 Cal. 461; Whitney v. Higgins, 10 Cal. 547; s. c. 70 Am. Dec. 748; Bradley v. Snyder, 14 Ill. 263; s. c. 58 Am. Dec. 564; Frische v. Kramer's Lessee, 16 Ohio 125; s. c. 47 Am. Dec. 368; Childs v. Childs, 10 Ohio St. 339; s. c. 75 Am. Dec. 512; Clark v.

mortgage debt,<sup>1</sup> even though the mortgagor has obtained a certificate of discharge in bankruptcy. The certificate only discharges the mortgagor from personal liability upon the debt.<sup>2</sup>

In the case of *Booker v. Waller*,<sup>3</sup> where one purchased land and gave a mortgage for its price to his grantors, who had given a mortgage to their grantors to secure the purchase money, and the land was foreclosed and sold under the latter mortgage, he was held, upon the evidence, entitled to redeem the property as against the wives of his grantors claiming under an executory contract of purchase made in their names through the intervention of a trustee, which contract had been rescinded by its own terms upon the redemption of the lands by a judgment creditor of the husbands, but renewed through the intervention of the trustee with the creditor so redeeming, after he had taken title.

§ 974. Same—Pending foreclosure—In some states a person acquiring an interest in the mortgaged property pending a foreclosure suit will not generally be permitted to redeem,<sup>4</sup> for the reason that all parties acquiring an interest in the subject matter of the suit *pendente lite* are bound and concluded by the judgment or decree;<sup>5</sup> and the grantee of the land by a deed which is not delivered until after the foreclosure of a mortgage on the same land, cannot redeem from the mortgage, even though he was not

Reyburn, 75 U. S. (8 Wall.) 321; bk. 19 Law ed. 354.

<sup>1</sup> *Douglass v. Bishop*, 27 Iowa 216; *Knowles v. Rablin*, 20 Iowa 104; *Street v. Beal*, 16 Iowa 68; s. c. 85 Am. Dec. 504; *Wood v. Goodwin*, 49 Me. 260; s. c. 77 Am. Dec. 259; *Johnson v. Candage*, 31 Me. 28; *Smith v. Kelly*, 27 Me. 237; s. c. 46 Am. Dec. 595; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146; *Taylor v. Porter*, 7 Mass. 355; *Childs v. Childs*, 10 Ohio St. 339; s. c. 75 Am. Dec. 512. COMPARE: *Dukes v. Turner*, 44

Iowa 579. See: *Post*, § 1030.

<sup>2</sup> *Childs v. Childs*, 10 Ohio St. 339; s. c. 75 Am. Dec. 512.

<sup>3</sup> 81 Ala. 549.

<sup>4</sup> *Cook v. Mancius*, 5 John. Ch. (N. Y.) 89.

<sup>5</sup> *Cook v. Mancius*, 5 John. Ch. (N. Y.) 89. See: *Craig v. Ward*, 36 Barb. (N. Y.) 382; *Harrington v. Slade*, 22 Barb. (N. Y.) 161; *People's Bank v. Hamilton Mfg. Co.*, 10 Paige Ch. (N. Y.) 481; *Sedgwick v. Cleveland*, 7 Paige Ch. (N. Y.) 287; *Darling v. Osborne*, 51 Vt. 150.

served with the summons in the action,<sup>1</sup> because the court is not bound to take notice of any interest acquired by purchase in the subject matter of the suit pending the action.<sup>2</sup> It is held by some of the cases, however, that the equity of redemption is not extinguished until after a sale made under the judgment and decree of the court, and that consequently one purchasing after the decree, but before the sale, is entitled to redeem.<sup>3</sup>

§ 975. **Same—After foreclosure.**—The grantee of the mortgagor has a right to redeem, though not mentioned in the decree of foreclosure,<sup>4</sup> by paying the balance due upon the mortgage after sale under foreclosure, as well as the purchase money.<sup>5</sup> He may redeem withstanding a foreclosure and sale, when he was not made a party to the foreclosure proceedings; and it matters nothing to the mortgagee, or those claiming under the mortgagee, whether the conveyance of the equity of redemption was voluntary or even fraudulent as to creditors.<sup>6</sup> It is held in New York, however, that a grantee of land by a deed which is not delivered until after the foreclosure of a mortgage on the land cannot redeem from the mortgage, although not served with the summons in the action.<sup>7</sup>

<sup>1</sup> *Russ v. Stratton*, 11 Misc. 565; 32 N. Y. Supp. 767.

<sup>2</sup> *Cook v. Mancius*, 5 John. Ch. (N. Y.) 89. See: *Hall v. Jack*, 32 Md. 253; *Inloes v. Harvey*, 11 Md. 524. *Haven v. Adam*, 90 Mass. (8 Allen) 366; *McPherson v. Housel*, 13 N. J. Eq. (2 Beas.) 301; *Allen v. Morris*, 34 N. J. L. (5 Vr.) 159; *Harrington v. Slade*, 22 Barb. (N. Y.) 161; *Murray v. Ballou*, 1 John. Ch. (N. Y.) 566; *Porter v. Barclay*, 18 Ohio St. 546; *Price v. White*, 1 Bailey (S. C.) Eq. 244; *Lewis v. Mew*, 1 Strobb. (S. C.) Eq. 180; *August v. Seeskind*, 6 Cold. (Tenn.) 166; *Allen v. Atchinson*, 26 Tex. 616; *Davis v. Christian*, 15 Gratt. (Va.) 1; *Tilton v. Cofield*, 93 U. S. 163; bk. 23 L. ed. 858; *Worsley v.*

*Scarborough*, 3 Atk. 392; *Mead v. Orrery*, 3 Atk. 242; *Garth v. Ward*, 2 Atk. 175; *Moore v. McNamara*, 2 Ball & B. 186; s.c. 12 Rev. Rep. 73; *Gaskeld v. Durdin*, 2 Ball & B. 169; *Re Barnard's Banking Company*, L. R. 2 Ch. 171; *Sorrell v. Carpenter*, 2 Pr. Wms. 482; *Winchester v. Paine*, 11 Ves. 194; s. c. 8 Rev. Rep. 131, Com. Dig. Ch. 4 C. 3 & 4; 2 Fonbl. Eq. B. 2, C. 6, S. 3, note n.

<sup>3</sup> *Willis v. Smith*, 66 Tex. 31, s. c. 17 S. W. Rep. 247.

<sup>4</sup> *Farrell v. Parlier*, 50 Ill. 274.

<sup>5</sup> *Bradley v. Snyder*, 14 Ill. 263; s. c. 58 Am. Dec. 564.

<sup>6</sup> *Id.*

<sup>7</sup> *Russ v. Stratton*, 11 Misc. 565; 32 N. Y. Supp. 767.



The equity of redemption not being extinguished until after a sale under the decree of foreclosure, one purchasing after the decree, but before the sale, may redeem.<sup>1</sup> Thus, it is said by the supreme court of Connecticut, in the case of *Loomis v. Knox*,<sup>2</sup> that a conveyance by a mortgagor whose right to redeem has been foreclosed, and who is not in possession, of all his interest in the premises to a third person, is valid, and passes a right of redemption acquired by payment of the debt of a junior lienor who was not made a party to the foreclosure proceeding. But an assignee of the equity of redemption under a mortgage executed at a time when the assignee of the equity has no right to redeem cannot be given such right by subsequent legislation.<sup>3</sup>

The Texas court of civil appeals, in the case of *Maulding v. Coffin*,<sup>4</sup> say that a purchaser from the mortgagor in a mortgage containing a power of sale, of which the purchaser had noticed, has no right to redeem from such sale after the exercises of such power and a sale of the premises by the mortgagee. The rule as to the right of redemption in case of a judicial foreclosure sale, to which the owner is not made a party, is inapplicable in such case.

§ 976. **Same—At execution sale.**—Where the equity of redemption is sold under a levy of execution, the mortgagor's right to redeem is thereby lost to him,<sup>5</sup> and passes to the purchaser, who may redeem if he so elects,<sup>6</sup> but can-

<sup>1</sup> *Loomis v. Knox*, 60 Conn. 343; s. c. 22 Atl. Rep. 771; *Willis v. Smith*, 60 Tex. 31. See: *McMillan v. Richards*, 9 Cal. 365; s. c. 70 Am. Dec. 655.

**Mortgagor's estate after foreclosure sale, and before conveyance** to purchaser is subject to the lien of a judgment against the mortgagor. *McMillan v. Richards*, 9 Cal. 365; s. c. 70 Am. Dec. 655.

<sup>2</sup> 60 Conn. 343; s. c. 22 Atl. Rep. 771.

<sup>3</sup> *Lehman v. Moore*, 93 Ala. 186; s. c. 9 So. Rep. 590.

<sup>4</sup> 6 Tex. Civ. App. 416; s. c. 25 S. W. Rep. 480.

<sup>5</sup> *Punderson v. Brown*, 1 Day (Conn.) 93; s. c. 2 Am. Dec. 53.

<sup>6</sup> *Cohn v. Hoffman*, 56 Ark. 119; s. c. 19 S. W. Rep. 233; *Robertson v. Van Cleave*, 29 Ind. 217, 231; s. c. 26 N. E. Rep. 899; 15 L. R. A. 68; *Nesbitt v. Hanway*, 87 Ind. 400; *Julian v. Bell*, 26 Ind. 220; 89 A. D. 460; *Hammond v. Leavitt*, 59 Iowa 407; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; 68 Am. Dec. 729. See: *Boarman v. Carlett*, 21 Miss. 149; *Insley v. United States*, 105 U. S. 512; bk.

not be compelled to do so;<sup>1</sup> and where he elects to exercise this right, he will be subrogated to the rights of the mortgagee.<sup>2</sup> It is thought the holder of a sheriff's certificate, given on an execution sale, has a right to redeem from a foreclosure sale as a lienholder, but not as an owner, although no express provision is made therefor by statute.<sup>3</sup> His right under his purchase is essentially that of a

37, L. ed. 1163; s.c. 14 Sup. Ct. Rep. 158.

Purchaser of equity of redemption at sheriff's sale succeeds to the rights of the judgment plaintiff, and may redeem as against a prior incumbrancer before foreclosure and sale, although he or the judgment plaintiff may have been a party to the foreclosure suit. *Julian v. Bell*, 89; 20 Ind. 220, A. D. 460.

<sup>1</sup> *Rogers v. Meyers*, 68 Ill. 92.

<sup>2</sup> *Hammond v. Leavitt*, 59 Iowa 407; s. c. 13 N. W. Rep. 397.

<sup>3</sup> *Robertson v. Van Cleave*, 129 Ind. 217; s. c. 26 N. E. Rep. 899; 15 L. R. A. 68.

In Alabama the purchaser at an execution sale of the equity of redemption in mortgaged lands has no equity, upon seeking redemption from the mortgagee, to compel the application of personal property embraced in the same mortgage, to the payment of the mortgage debt to the exoneration of the land; and the appointment of a receiver to take charge of such personality, upon bill filed by the purchaser to redeem the mortgaged lands, and an order for its sale and the application of the proceeds to the mortgage debt, in case of the land, are erroneous. *Lovelace v. Webb*, 62 Ala. 271.

In Arkansas a judgment creditor who purchased his debtor's equity of redemption in lands at execution sale on his judgment, subject to prior

mortgage liens, is entitled to redeem from the mortgagee, who, after the rendition of the judgment, but before the execution sale, bought up several claims against the debtor, and took a deed from him in satisfaction of all his demands, and went into possession, by payment of the prior mortgage liens only, without paying the debts created after his judgment lien attached to the land. *Cohn v. Hoffman*, 56 Ark. 119; s. c. 19 S. W. 233.

In Indiana a purchaser at a sheriff's sale of mortgaged property, not made a party to a suit to foreclosure brought before his right to a deed matures, may redeem after his title matures, and need not aver a tender or offer to pay the money necessary to redeem. *Nesbit v. Hanway*, 87 Ind. 400.

A statement by the holder of a sheriff's certificate, in order to give him the right to redeem from a mortgage sale, must, under Ind. Rev. Stat. § 772, state the amount and date of the judgment, as well as the amount due and unpaid; and a mere reference to the sheriff's certificate is not sufficient. *Id.* *Roberts v. Van Cleave*, 129 Ind. 217; s. c. 26 N. E. 899; 15 L. R. A. 68; *Nesbit v. Hanway*, 87 Ind. 400.

In Kentucky a purchaser under sale of equity of redemption only acquires lien upon it for the payment of the purchase money and interest, since the adoption of the revised statutes of

judgment creditor,<sup>1</sup> and to be valid the judgment and execution must be regular; where the judgment upon which the execution was issued is irregular, the sale will be invalid, the purchaser acquires no right to redeem from a mortgage foreclosure sale of the land, and the title acquired under such foreclosure will not be divested by such redemption.<sup>2</sup>

In those cases where the purchaser of the mortgagor's equity of redemption at an execution sale exercises the right and redeems the mortgage, the mortgagor may redeem from the execution sale within the time allowed by law, and thereafter redeem from the mortgage sale within the time allowed for that purpose.<sup>3</sup>

§ 977. Same—At foreclosure sale.—A purchaser at a foreclosure sale of a first mortgage, with knowledge that persons interested in the mortgaged premises were not made parties to the foreclosure suit, takes the title thereto subject to the right of redemption in such interested parties;<sup>4</sup> and on assignment, with like notice, his assignee will hold subject to the same right of redemption.<sup>5</sup>

Kentucky; and if, at the sale, the previous incumbrancer is in possession, under the terms of the deed creating the incumbrance, a court of equity will secure him in the possession, leaving to the purchaser the benefit of the lien acquired under the sale. *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; s. c. 68 Am. Dec. 729.

In Mississippi there is an exception to the general rule, it being held in that state that a purchaser of mortgaged property under execution against the mortgagor, before forfeiture of the mortgage, or payment of the mortgaged debt, having by his purchase acquired no interest in or lien of the mortgaged property, has no right to redeem it. But it would be otherwise if by the purchase he acquired any right. *Boarman v. Catlett*, 21 Miss. 149.

The United States supreme

court say that where real estate is sold on execution, and is afterwards sold on foreclosure of a prior mortgage, the purchaser at the execution sale, if not made a party to the foreclosure proceedings, may redeem and treat the deed made on foreclosure as a mortgage and the purchaser on foreclosure sale as a mortgagee in possession. *Insley v. United States*, 150 U. S. 512; bk. 37, L. ed. 1163; s. c. 14 Sup. Ct. Rep. 158.

<sup>1</sup> *Robertson v. Van Cleave*, 129 Ind. 217; s. c. 26 N. E. Rep. 899; 15 L. R. A. 68.

<sup>2</sup> *Wooters v. Pinkel* (Ill.) 25 N. E. 791; aff'd *Hoovers v. Joseph*, 137 Ill. 113; s. c. 27 N. E. Rep. 80.

<sup>3</sup> *Atkins v. Sawyer*, 18 Mass. (1 Pick.) 351, 354.

<sup>4</sup> *Murphy v. Farwell*, 9 Wis. 102.

<sup>5</sup> *Hoppin v. Doty*, 22 Wis. 621; *Hodson v. Treat*, 7 Wis. 263.

The purchaser at a foreclosure sale of a junior mortgage may, within the time allowed by statute, redeem from the foreclosure of a prior mortgage.<sup>1</sup> But it is said that a purchaser at a mortgage foreclosure sale, who has neglected to pay the balance of the purchase price until the mortgagee has elected to treat the contract of purchase as abandoned and has transferred all his interest to another, cannot, as against the latter, redeem the premises from the mortgage and enforce his purchase.<sup>2</sup>

§ 978. **Same—From sole heir.**—The supreme court of Michigan, in the case of *Squire v. Wright*,<sup>3</sup> say that one to whom the sole heir of a mortgagor executed a deed to enable him to redeem from a sale on foreclosure, made after the departure and reputed death of the mortgagor, has a right to redeem for the mortgagor if living, and if not, then for himself as grantee of the heir.

§ 979. **Same—From grantee of owner of equity of redemption.**—In the recent case of *Case v. Fry*,<sup>4</sup> the supreme court of Iowa say that a purchaser of land by quit claim deed from one whose right to redeem from a

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<sup>1</sup> *Hasselman v. McKernan*, 50 Ind. 441; *Buchanan v. Reid*, 43 Minn. 172; s. c. 45 N. W. Rep. 11; *Minter v. Carr* (1894), 2 Ch. 321.

As a "creditor having a lien," in *Minnesota*, *Buchanan v. Reid*, 43 Minn. 172; s. c. 45 N. W. Rep. 11.

In *Indiana*, the holder of a junior mortgage who has foreclosed his mortgage in a suit without making a senior mortgagee a party, and who has bought in the mortgaged premises at a sheriff's sale on the decree, has a right to redeem the mortgaged premises from the senior mortgage, though the senior mortgagee may have previously foreclosed his mortgage without making the holder of the junior mortgage a party to the action, and though the premises may have been sold by the sheriff on the decree and bought in by

the senior mortgagee. *Hasselman v. McKernan*, 50 Ind. 441.

In *England*, it is held that the right of redemption by a purchaser under a second mortgage to redeem the property covered by that mortgage alone, as against one holding first mortgages upon that and other properties from the same mortgagor, is not affected by the fact that a prior holder of such second mortgage and of the equity of redemption held a subsequent mortgage upon both properties. *Minter v. Carr* (1894), 2 Ch. 321.

<sup>2</sup> *Atkins v. Tutwiler* (Ala. 1892), 11 So. Rep. 640.

<sup>3</sup> 85 Mich. 76; s. c. 43 N. W. Rep. 236.

<sup>4</sup> 91 Iowa 132; s. c. 59 N. W. Rep. 333.

foreclosure sale has not expired, has the right to redeem, notwithstanding an agreement made before the commencement of foreclosure proceedings, by which the grantor and his wife conveyed the land to trustees, with a provision that the trustees should sell the land and pay all commissions, costs, and expenses, and turn over the remaining proceeds or deed the residue of the land upon the order of the grantor's wife, where it is provided that the stipulation shall be in force and effect for one year only, and that time is the essence of the stipulation, and no sale of the property, or any part of it, is made by the trustees, although the decree of foreclosure recognizes the trust agreement and the money is paid to the trustees in consequence, but the scope and effect of such agreement are not involved in the foreclosure proceedings, and no attempt is made to extend it beyond the year provided for, and such year has not expired when the decree was made.

§ 980. **Remainderman and revisioner.**—A right of redemption is vested in a remainderman or a revisioner of real property.<sup>1</sup> It has been said, by the supreme court of Missouri, in the case of *Stevenson v. Edwards*,<sup>2</sup> that a remainderman, under a deed, has a right to redeem lands conveyed thereby and mortgaged by the life tenant, although such deed has been declared fraudulent as against creditors, as such fraud does not affect the rights of the parties as between themselves.

§ 981. **Stranger to transaction.**—We have already seen that, to entitle a person to redeem from a mortgage, he must show good title in himself, and a legal right to redeem, before he, though holding the title of a mortgagor, can effect the discharge of the mortgage, or remove a prior incumbrance;<sup>3</sup> hence, an action cannot be maintained by a

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<sup>1</sup> *Stevenson v. Edwards*, 98 Mo. 622; *Raffey v. King*, 1 Keen 601; *Rawald v. Russel*, Younge 9.

<sup>2</sup> 98 Mo. 622; s.c. 12 S.W.Rep.255.

<sup>3</sup> *Eastman v. Batchelder*, 26 N. H. 141; s. c. 72 Am. Dec. 295. See: *Ante*, § 937.



mere volunteer or stranger to the transaction,<sup>1</sup> unless the right to redeem has been reserved to such stranger, and then it must be an express reservation.<sup>2</sup> But should the purchaser at an execution sale permit redemption to be made by a stranger, the latter will be considered as acting on behalf of the execution defendant.<sup>3</sup>

§ 982. **Sub-agents may redeem**—**When.**—In those cases where redemption to mortgaged premises is effected through a sub-agent, under color of authority, and the acts of such sub-agent are subsequently ratified by the principals, it will be binding upon the person who purchased the land at foreclosure sale.<sup>4</sup> In the course of the opinion, in the case of *Teucher v. Hiatt*,<sup>5</sup> the supreme court of Iowa say: "While it is true, as stated by counsel for appellant, that 'agency is generally a personal trust and confidence which cannot be delegated,' yet there is nothing in this case to show but that the agent Ratcliff was authorized to affect the redemption through a sub-agent. The ratification of the act of the sub-agent would tend to show that this was so. However this may be, the redemption effected by such sub-agent, under color of authority, and whose act was ratified by the principal, is good and sufficient as against the defendant Stewart."<sup>6</sup>

§ 983. **Subsequent lienor.**—It is a well established principle that parties acquiring an interest subsequent to the plaintiff in an action for the foreclosure of a mortgage

<sup>1</sup> *Phyfe v. Riley*, 15 Wend. (N. Y.) 248; s. c. 30 Am. Dec. 50. See: *Butts v. Broughton*, 72 Ala. 294; *Rapier v. Gulf City Paper Co.*, 64 Ala. 230; *Union Mutual Life Insurance Co. v. White*, 106 Ill. 67; *Rogers v. Meyer*, 68 Ill. 92; *Beach v. Shaw*, 57 Ill. 17; *Skinner v. Young*, 80 Iowa 234; s. c. 45 N. Y. Rep. 889; *Penn v. Clemans*, 19 Iowa 372; *Bayington v. Buckwalter*, 7 Iowa 512; *Powers v. Gold Lumber Co.*, 43 Mich. 468; s. c. 5 N. W. Rep. 656; *Haywood v. Underwood*, 28 Mich. 427; *Cousin v. Allen*, 28 Mich. 232; *Moore*

*v. Beasom*, 44 N. H. 215; *Meehan v. Forrester*, 52 N. Y. 277; *Eaton v. North*, 25 Wis. 514.

<sup>2</sup> *Purvis v. Brown*, 4 Ired. (N. C.) Eq. 415.

<sup>3</sup> *Phyfe v. Riley*, 15 Wend. (N. Y.) 248; s. c. 30 Am. Dec. 55.

<sup>4</sup> *Teucher v. Hiatt*, 23 Iowa 527.

<sup>5</sup> 23 Iowa 527.

<sup>6</sup> See: *Masterson v. Beasley*, 3 Ohio 301; *McCord v. Bergautz*, 7 Watts. (Pa.) 487; *Patterson v. Brindle*, 9 Watts. (Pa.) 98. See: *Blackwell Tax Titles*, 501, 504.

and before the commencement of such action, who are not parties, possess both a statutory and an equitable right to redeem from the sale made under the judgment and decree in such action.<sup>1</sup> Such subsequent lienholder cannot be deprived of his right to collect his debt by redemption, to the extent of the value of the property sold over the amount paid to redeem, by the interposition of the liens of fraudulent and simulated securities.<sup>2</sup> It is thought that the right of a junior mortgagee to redeem from the senior mortgagee, by paying his debt, with interest and costs, is an equitable right, founded on common law principles, and is entirely independent of the statutory right of redemption given to judgment creditors.<sup>3</sup> It has been properly said that a subsequent party in interest, whether by way of mortgage liens or judgment, cannot, on motion, obtain a right to redeem and have the property conveyed to him by a purchaser.<sup>4</sup> The only remedy in such a case is by action seeking to enforce the right of redemption.<sup>5</sup>

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<sup>1</sup> Moore v. Andres, 14 Ark. 678; s. c. 60 Am. Dec. 551; Whitney v. Higgins, 10 Cal. 547; s. c. 70 Am. Dec. 748; Bradley v. Snyder, 14 Ill. 263; s. c. 58 Am. Dec. 564; Stewart v. Johnson, 30 Ohio St. 30; Frische v. Kramer's Lessee, 16 Ohio St. 125; s. c. 47 Am. Dec. 368; Clark v. Reymburn, 75 U. S. (8 Wall.) 321; bk. 19 L. ed. 354.

<sup>2</sup> Parker v. St. Martin, 53 Minn. 1; s. c. 55 N. W. Rep. 113.

<sup>3</sup> This right applies equally to deeds of trust to secure the payment of debts and to mortgages proper. Wiley v. Ewing, 47 Ala. 418. See: Beach v. Shaw, 57 Ill. 17; Hodgen v. Guttery, 58 Ill. 431.

<sup>4</sup> See: *Ante*, § 895.

<sup>5</sup> Douglass v. Woodworth, 51 Barb. (N. Y.) 79.

In this case it is said that in a foreclosure suit, after the property has been sold and the deed delivered on

such a motion made alleging that the parties have been misled by erroneous information, the only thing that can be done is to put the judgment suit aside on sale and conveyance, and order a resale of the property. Such sale can be made only on terms indemnifying the purchaser, repaying to him the money paid to him on the purchase and all expenses incident thereto. Douglass v. Woodworth, 51 Barb. (N. Y.) 79.

Under Iowa Rev. Stat., § 3664, upon action at law upon notes secured by mortgage, a junior mortgagee has a right to redeem only as provided by that section of the statute. He has a right of redemption distinguished from an equity of redemption. Mayer v. Farmer's Bank, 44 Iowa 212.

In this case the judgment obtained was properly made a lien upon the lands covered by the mortgage. And if it was by its terms made a lien upon

§ 984. Sureties may redeem.—On the well recognized principle that a surety has the right to avail himself of the securities held by the creditor, after he has satisfied the debt, a surety for the mortgage debt, even though he has no interest in or lien upon the mortgaged estate, has a right to redeem from the mortgage lien and be subrogated to the rights of the mortgagee.<sup>1</sup> But it has been held by the supreme court of Iowa, in the case of *Miller v. Ayres*,<sup>2</sup> that a surety on a mortgage note, against whom judgment has been rendered in proceedings to foreclose, has no right to redeem from the purchaser at the foreclosure sale. The court say: "Counsel for the plaintiff insist that a surety has the right to redeem to the same extent as the principal debtor, and when he does so is entitled to be subrogated to the rights of the creditor. Authorities are cited in support of this proposition. That a surety before a sale may pay off a debt, and be subrogated to the rights of the creditor, is probably true. The authorities cited do not, we think, go further than this. But the right of any person to redeem, after a sale under a mortgage foreclosure, depends upon the statute. If there is no statute so providing there is no such right."

§ 985. Tenants by the curtesy.—That a tenant by the curtesy has such an interest in the mortgaged lands as will entitle him to redeem, is settled by two old cases.<sup>3</sup> I

all the real estate of defendant, including other than that covered by the mortgage, this would not render it void, but only voidable, as property not embraced in the mortgage. *Ib.* *Mayer v. Farmer's Bk.*, 44 Iowa 212.

<sup>1</sup> *Averill v. Taylor*, 8 N. Y. 44, 51; *Ex parte Crisp*, 1 Atk. 133; *Green v. Wynn*, L. R. 21 Ch. 204; *Wade v. Coope*, 2 Sim. 155; *Mayhew v. Cricket*, 2 Swanst. 185; *Wright v. Morley*, 11 Ves. 21; s. c. 8 Rev. Rep. 69

The dictum of Sir William Grant, Master of the Rolls, in *Wright v. Morley*, *supra*, to the effect that a

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creditor is entitled to the benefit of the securities given by the principal debtor was supposed to rest upon *Mawer v. Harrison*, 1 Eq. Cas. Abr. 93, but an investigation of that case revealed that it is no real authority for any such proposition, and in the absence of any other authority in support of the dictum, the court declined to follow it in *In re Walker*, 1892, 1 Ch. 621.

<sup>2</sup> 59 Iowa 424; s. c. 13 N. W. Rep. 436.

<sup>3</sup> See: *Swannock v. Penelope*, Ambler 6; *Casburne v. Inglis*, 2 Jac. & W. 194.

am not aware that the question has been adjudicated in this country, but on principle I regard the decisions in the English cases cited above, as correct.

§ 986. **Tenant in dower.**—It is well settled that an inchoate right of dower in a wife is a sufficient estate in mortgaged lands to entitle her to maintain a bill in equity to redeem such lands, and the fact that she joined her husband in the execution of the mortgage will not affect her rights;<sup>1</sup> and she may redeem although an assignment of dower has not yet been made to her.<sup>2</sup> The widow's right to redeem exists equally whether the mortgage was executed before or after marriage.<sup>3</sup> The reason for this is that the widow is directly interested in the payment of the mortgage debt, and so long as the title of the mortgagee has not been made absolute by foreclosure, she is entitled to pay the debt and take dower in the premises. She may avail herself of the right that she has, even at law, as against all others, in any mode not inconsistent with the rights and interest of the mortgagee.<sup>4</sup>

The supreme judicial court of Massachusetts, in the case of *Davis v. Wetherell*,<sup>5</sup> say that no adjudged case has been found in which a wife having an inchoate right of dower has not been allowed to redeem from a mortgage in which she had joined with her husband, and this is thought to be true

<sup>1</sup> *Davis v. Wetherell*, 95 Mass. (13 Allen) 60; s. c. 90 Am. Dec. 177. See: *Wiley v. Ewing*, 47 Ala. 227; *Fletcher v. Holmes*, 38 Ind. 497, 537; *Wilkins v. French*, 20 Me. 111; *Lamb v. Montague*, 112 Mass. 352; *Farwell v. Cotting*, 90 Mass. (8 Allen) 211; *Burns v. Lynde*, 88 Mass. (6 Allen) 905; *Eaton v. Simonds*, 31 Mass. (14 Pick.) 98; *Greiner v. Klein*, 28 Mich. 16; *Bell v. Mayor, etc.*, of New York, 10 Paige Ch. (N. Y.) 49; *Vanduyne v. Thayre*, 14 Wend. (N. Y.) 236; *Kling v. Ballentine*, 40 Ohio St. 394; *Gatewood v. Gatewood*, 75 Va. 407.

<sup>2</sup> *Henty's Case*, 58 Mass. (5 Cush.) 257; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 151, 153; *Peabody v. Patton*, 19 Mass. (2 Pick.) 519.

<sup>3</sup> *Opdyke v. Barddes*, 11 N. J. Eq. (3 Stock.) 133.

<sup>4</sup> *Bell v. Mayor, etc.*, of New York, 10 Paige Ch. (N. Y.) 49. See: *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Wheeler v. Morris*, 3 Bosw. (N. Y.) 534; *Titus v. Neilson*, 5 John. Ch. (N. Y.) 452.

<sup>5</sup> 95 Mass. (13 Allen) 60; s. c. 90 Am. Dec. 177.

at common law, but under the statutes in many of the states it has been repeatedly held that a foreclosure, in the mode provided by statute, of a mortgage in which the wife joined with her husband to release her dower, or in case the husband had only been seized of an equity of redemption during coverture, bars the right of dower,<sup>1</sup> even though the wife is not made a party to the suit.<sup>2</sup> Upon general principles of equity it is difficult to find a reason why an inchoate right of dower should not be protected against extinguishment by the foreclosure of a mortgage; especially where the husband had parted with his whole estate in the land, and can no longer be regarded as in any sense representing the interests of the wife. Coverture is no bar to the maintenance of a suit in equity; and it is the policy of our legislation to permit married women to assert, protect and sue for their separate rights of property.<sup>3</sup>

But a tenant in dower, who seeks to maintain a bill in equity to redeem land from a mortgage made by her husband and herself, must first offer to pay the whole amount due on the mortgage.<sup>4</sup> The reason for this rule is the fact that the widow has a right to surplus only of proceeds of mortgaged premises, where she joined in the mortgage of her husband's land for his debt and the land is sold on foreclosure.<sup>5</sup> It is said, however, that the wife's inchoate right of dower in lands which are sold under foreclosure during the lifetime of her husband is extinguished, and in such a case she will not be entitled to redeem.<sup>6</sup>

<sup>1</sup> *Davis v. Wetherell*, 95 Mass. (13 Allen) 60; s. c. 90 Am. Dec. 177.

<sup>2</sup> *Pitts v. Aldrich*, 93 Mass. (11 Allen) 39; *Farwell v. Cotting*, 90 Mass. (8 Allen) 211; *Savage v. Hall*, 78 Mass. (12 Gray) 363; *Wedge v. Moore*, 60 Mass. (6 Cush.) 8.

<sup>3</sup> *Davis v. Wetherell*, 95 Mass. (13 Allen) 60; s. c. 90 Am. Dec. 177.

<sup>4</sup> *McCabe v. Bellows*, 93 Mass. (7 Gray) 148; s. c. 66 Am. Dec. 467. See: *Brown v. Lapham*, 57 Mass. (3 Cush.) 554; *Eaton v. Simonds*, 31

Mass. (14 Pick.) 98; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 151, 153. See: *Post*, § 994.

<sup>5</sup> *Matthews v. Duryee*, 4 Keyes (N. Y.) 535; s. c. 3 Abb. Ap. Dec. 221; *House v. House*, 10 Paige Ch. (N. Y.) 165; *Halley v. Bradford*, 9 Paige Ch. (N. Y.) 200.

<sup>6</sup> *Newhall v. Lynn Five Cent Bank*, 101 Mass. 432; *Frost v. Peacock*, 4 Edw. Ch. (N. Y.) 678, 695; *Matthews v. Duryee*, 4 Keyes (N. Y.) 540; s. c. 3 Abb. Ap. Dec. 221; *Titus v. Neil-*



§ 987. **Tenant for life.**—It is said by the supreme judicial court of Massachusetts, in the case of *Lanson v. Drake*,<sup>1</sup> that a tenant for life of land, on which there is a mortgage overdue, cannot hold possession of the land against the mortgagee by paying interest as it accrues; neither can he, by paying the amount of the mortgage, compel the mortgagee to assign it to him; but a bill brought for the purpose may be maintained as a bill to redeem in those cases where the plaintiff alleges his willingness to pay the amount due on the mortgage.<sup>2</sup>

§ 988. **Tenant for years.**—A person in possession as tenant for years of lands mortgaged by his lessor, has such an interest therein as will entitle him to redeem from the mortgage lien.<sup>3</sup> The court of chancery of New Jersey, in the case of *Hamilton v. Dobbs*,<sup>4</sup> say that a tenant for years who pays off a mortgage debt is not entitled to demand a written assignment of the bond and mortgage, but that after redemption he stands in the place of the mortgagee, and will be subrogated to his rights against the mortgagor and of those claiming under him. He will have the right to require the bond and mortgage to be delivered to him uncanceled, and this, in such a case, is in equity, and may be at law, a complete assignment.<sup>5</sup>

§ 989. **Tenants in common.**—A tenant in common of mortgaged lands may redeem from the mortgage lien in

son, 5 John. Ch. (N. Y.) 452; *Bell v. Mayor, etc., of New York*, 10 Paige Ch. 49; *Halley v. Bradford*, 9 Paige Ch. 200.

<sup>1</sup> 105 Mass. 564. See: *Rafferty v. King*, 1 Keen 618; *Ravald v. Russell*, 1 Younge 19.

<sup>2</sup> See: *Lamb v. Montague*, 112 Mass. 352; *Aynsly v. Reed*, 1 Dick. 249; *Evans v. Jones*, 1 Kay 29; *Wickes v. Scrivne*, 1 John. & H. 215.

<sup>3</sup> *McDermott v. Burke*, 16 Cal. 580; *Davis v. Wetherell*, 95 Mass. (13 Allen) 60; s. c. 90 Am. Dec. 177; *Clary v. Owen*, 81 Mass. (15 Gray) 521; *Loud v. Lane*, 49 Mass. (8 Met.)

517, 519; *Bacon v. Bowdoin*, 39 Mass. (22 Pick.) 401, 404; s. c. 43 Mass. (2 Met.) 591; *Mayo v. Fletcher*, 32 Mass. (15 Pick.) 523; *Hamilton v. Dobbs*, 19 N. J. Eq. (4 C. E. Gr.) 227; *Arnold v. Green*, 116 N. Y. 572; s. c. 23 N. E. Rep. 1; *Willing v. Reyerson*, 94 N. Y. 103; *Averill v. Taylor*, 8 N. Y. 44; *Lane v. King*, 8 Wend. (N. Y.) 584; *Keech v. Hall*, 1 Doug. 21; s. c. 2 Smith Lead. Cas. (9th Am. ed.) 823.

<sup>4</sup> 19 N. J. Eq. (4 C. E. Gr.) 227.

<sup>5</sup> As to assignment of mortgage on redemption, See: *Ante*, § 895.

order to protect his interest where he has not been guilty of laches, or otherwise estopped;<sup>1</sup> but he will not thereby acquire a right to the whole estate to the exclusion of his co-tenants, and should he take to himself a transfer of the legal title the share of the mortgage which it belonged to him to pay becomes extinguished and his title in his own portion of the land will be perfected; but as to the residue he becomes subrogated to the rights of the mortgagee and can call upon his co-tenants to contribute their share or be foreclosed of their right to redeem.<sup>2</sup>

In the case of *Crafts v. Crafts*,<sup>3</sup> where one tenant in common of real estate conveyed to two, paid his half of the purchase money, and joined with his co-tenant in a note and mortgage to secure the payment of the other half, and afterwards released his interest in the land to the mortgagee, the supreme judicial court of Massachusetts held that his co-tenant, or one claiming under him with notice of the facts, could not redeem the estate without paying the full amount of the mortgage.<sup>4</sup>

§ 990. **Tenant in tail.**—It is thought that the case of *Playford v. Playford*<sup>5</sup> is authority for the proposition that a tenant in tail has such an interest in the lands as will entitle him to redeem from a mortgage lien; but this estate is of such rare occurrence in this country that the proposition has more theoretical than practical importance.

§ 991. **Title Insurance Company cannot redeem, when.**—It is held that a title insurance company which has insured the title of certain parties to land derived through a foreclosure sale has not such an interest in the land, within the meaning of the New York statute,<sup>6</sup> as to entitle it to be made a party defendant in an action to redeem from the

<sup>1</sup> *Norton v. Sharp*, 53 Mich. 146; s. c. 18 N. W. Rep. 601.

<sup>2</sup> *Young v. Williams*, 17 Conn. 398.

<sup>3</sup> 79 Mass. (13 Gray) 360.

<sup>4</sup> See: *Lyon v. Robbins*, 45 Conn. 518; *Seymour v. Davis*, 35 Conn. 264;

*Kingbury v. Buckner*, 70 Ill. 514; *Craithers v. Stuart*, 87 Ind. 424; *Laylin v. Knox*, 41 Mich. 40; s. c. 1 N. W. Rep. 913; *Wynne v. Styan*, 2 Phil. Ch. 306.

<sup>5</sup> 4 Hare 546.

<sup>6</sup> N. Y. Code Civ. Proc. § 452.

lien of the mortgage, where there is no charge of misconduct against the insured, and it will give the company an unfair opportunity to protect its interests without being defendant.<sup>1</sup>

§ 992. **Trustee of absent debtor.**—It has been held that the trustee of an absent debtor has such an interest in the land as will entitle him, under certain circumstances, to redeem from the lien of the mortgage.

§ 993. **Wife joining in mortgage.**—We have already seen<sup>2</sup> that the wife's right of inchoate dower in mortgaged lands is a sufficient title to enable her to redeem them from the lien of the mortgage.<sup>3</sup> It has been said that a wife who, solely to relinquish her right of dower and homestead joined with her husband in a deed of lands conveyed to them by entirety and not by moieties, is not estopped from redeeming from a previous mortgage thereon, notwithstanding her agreements and admissions, made under her misapprehension as to her right of property, and without intent to deceive.<sup>4</sup> And where a wife who is a part owner of the mortgaged premises is not made a party to an action to foreclose, she will be entitled to redeem, although her husband was made a party and his right in the remainder of the land foreclosed.<sup>5</sup>

The supreme court of Michigan, in the recent case of *Moore v. Smith*,<sup>6</sup> say that a wife holding a homestead and

<sup>1</sup> *Russ v. Stratton*, 8 Misc. (N. Y.) 6; s. c. 28 N. Y. Supp. 392; 59 N. Y. S. R. 384.

<sup>2</sup> See: *Ante*, § 896.

<sup>3</sup> See: *Roberts v. Fleming*, 53 Ill. 196; *Vaughan v. Dowden*, 126 Ind. 406; s. c. 26 N. E. Rep. 74; *Pierce v. Chance*, 108 Mass. 254; *Anthony v. Pierce*, 108 Mass. 251; *Moore v. Smith*, 95 Mich. 71; s. c. 54 N. W. Rep. 701; *Williams v. Stewart*, 25 Minn. 516; *Green v. Dixon*, 9 Wis. 532.

<sup>4</sup> *Pierce v. Chance*, 108 Mass. 254; *Anthony v. Pierce*, 108 Mass. 251.

<sup>5</sup> *Green v. Dixon*, 9 Wis. 532.

A wife is entitled, under a statute giving the right to redeem to anyone who has an undivided interest in the real estate, during the life of her husband, to redeem his lands from a sale made on foreclosure of a mortgage made by him thereon in which she joined, and to the proceedings to foreclose to which she was a party. *Vaughan v. Dowden*, 126 Ind. 406; s. c. 26 N. E. Rep. 74.

<sup>6</sup> 95 Mich. 71; s. c. 54 N. W. Rep. 701.

dower-right is entitled not only to redeem from a mortgage on the homestead, of which a statutory foreclosure has been had, but to have an assignment thereof upon payment to the mortgagee of the amount bid at the sale, although she has made no tender of the amount due, where it has been foreclosed by notice published in an obscure village paper, instead of in the city where the property is situated, and the mortgagee has, by every effort in his power, aided by the husband, attempted to prevent her from raising the money to acquire his interest or redeem from the foreclosure sale, and succeeded in preventing her from using the property, and in taking away from her other property which she had, and forcing her to institute a lawsuit to retain her personal property.<sup>1</sup>

The supreme judicial court of Massachusetts, in the case of *Lamb v. Montague*,<sup>2</sup> say that where one's equity of redemption has been sold by his assignee in bankruptcy, the mortgagor and his wife having a homestead, and she an inchoate right of dower in the mortgaged premises, they may maintain a bill to redeem, although not entitled to an assignment of the mortgage. But it has been said, in the case of *Taggart v. Rogers*,<sup>3</sup> that a wife who joined in a mortgage on her husband's lands, but was not served with process in an action for its foreclosure, is not entitled, during

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<sup>1</sup> In *Roberts v. Fleming*, 53 Ill. 196, while the right of redemption from a mortgage still existed, a junior mortgagee executed an agreement by which he agreed to sell and convey all his interest in the mortgaged premises for a certain sum, but payment was not to be made unless the right of the party purchasing, or his assigns, to redeem from the senior mortgage, should be established. This agreement was assigned to the wife of the mortgagor. Then the mortgagor and his wife executed a quitclaim deed for the premises, and the grantee therein released to the wife of the mortgagor. Court held that the wife thereby be-

came invested with the right to redeem from the senior mortgage, and that upon bill filed for redemption, by the party so invested with the right to redeem, the junior mortgagee should be made a party, because the terms of the agreement by which he transferred his interest remained unexecuted, leaving equities to be settled between him and the party with whom he contracted. Had he executed a deed, he would not have been a necessary party.

<sup>2</sup> 112 Mass. 352.

<sup>3</sup> 58 Hun (N. Y.) 608; mem. 12 N. Y. Supp. 113; 34 N. Y. S. R. 924.

her husband's life, to redeem the fee of the lands from the purchaser at the sale under the foreclosure; that the most she may obtain is a release of her inchoate right from the lien of the mortgage, or a payment of a fixed sum in lieu thereof.

§ 994. **Widow may redeem.**—Where a wife joins with her husband in the execution of a mortgage on his land, her rights and interests remaining in the land are such as to render it proper that she should be made a party to the foreclosure of the mortgage; and if she is not made a party the foreclosure stands for nothing as against her.<sup>1</sup> In such a case the wife, after the death of her husband, may redeem, but she can do so only by paying the whole mortgage debt, and not merely upon repayment of the price paid by the purchaser, where that price is less than the amount of the mortgage debt.<sup>2</sup>

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<sup>1</sup> *McGough v. Sweetzer*, 97 Ala. 361; s. c. 12 So. Rep. 162; 19 L. R. A. 470. See: *Eslava v. Lepretre*, 21 Ala. 504; s. c. 56 Am. Dec. 266; *Dough v. McLoskey*, 1 Ala. 78; *Leonard v. Villars*, 23 Ill. 377; *Gibbery v. Maggord*, 2 Ill. 471; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 151; *Miles v. Voorhies*, 20 N. Y. 412; s. c. 10 Abb. (N. Y.) Pr. 152; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *McArthur v. Franklyn* 15 Ohio St. 405; s. c. 16 Ohio St. 193.

<sup>2</sup> *McGough v. Sweetzer*, 97 Ala. 361; s. c. 12 So. Rep. 162; 19 L. R. A. 470. See: *McCabe v. Bellows*, 73 Mass. (7 Gray) 148; s. c. 66 Am. Dec. 467; *Newton v. Cook*, 70 Mass. (4 Gray) 46; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 151; *Chiswell v. Morris*, 14 N. J. Eq. (1 McCar.) 101; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Wheeler v. Morris*, 2 Bosw. (N. Y.) 524; *Ross v. Boardman*, 22

*Hun* (N. Y.) 527; *McArthur v. Franklyn*, 16 Ohio St. 193; *Collins v. Riggs*, 81 U. S. (14 Wall.) 491; bk. 20 L. ed. 723.

**On a bill to redeem**, brought by the mortgagor's widow in order to be let into her dower, the mortgagee is liable to account to her for the rents and profits received from the date of his entry into possession under the mortgage, and not merely from the date of her demand. 1873, *Dela v. Stanwood*, 62 Me. 574.

Where the estate of a decedent has been declared insolvent, and property has been set apart to his widow as a homestead, within the prescribed time, she has no right of redemption from a sale of such property under a mortgage given by her husband and herself while the property was being used as a family homestead. *Walden v. Speigner*, 87 Ala. 379; s. c. 6 So. Rep. 80.



## CHAPTER XL.

### REDEMPTION—TIME OF REDEMPTION.

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| <p>§ 995. In general.</p> <p>996. Before maturity.</p> <p>997. After maturity—Before foreclosure.</p> <p>998. Same—Same—Where mortgagor remains in possession.</p> <p>999. After foreclosure—Generally.</p> <p>1000. Same—After lapse of years.</p> <p>1001. Same—Computation of time.</p> <p>1002. Same—By junior lienholder.</p> | <p>§ 1003. Same—Receipt of rents and profits by mortgagee — Effect on right.</p> <p>1004. Same—Fraud—Effect on redemption.</p> <p>1005. Extension of time to redeem —By agreement of parties.</p> <p>1006. Same—By court on Statutory foreclosure.</p> <p>1007. Same—By court of equity, when.</p> <p>1008. Where mortgagee purchases at foreclosure sale.</p> |
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§ 995. In general.—The time within which redemption may be made from the lien of a mortgage is regulated by statute in most, if not all, the states. There is a sad want of uniformity in these statutory provisions. Under some statutes a certain time must elapse after default before proceedings in foreclosure can be commenced; under some a specified time (varying in almost every statute) is given within which to redeem after proceedings in foreclosure are instituted; under some no sale can be made of the mortgaged premises for a specified length of time (also varying) after the decree of foreclosure is entered; under some a sale, when properly made and confirmed, cuts off all right of redemption and vests the property absolutely in the purchaser; and under others a specified time (not uniform in length) after sale is given in which redemption may be made. Whatever the provision of the statute, it must be strictly complied with by the party seeking to redeem.<sup>1</sup>

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<sup>1</sup>See: Wood v. Holland, 53 Ark. 69; s. c. 13 S. W. Rep. 739; Collins v. Scott, 100 Cal. 446; s. c. 34 Pac. Rep. 1082; McIlwain v. Karstens, 152 Ill. 135; s. c. 38 N. E. Rep. 555; Sutterlin v. Connecticut Mut. L. Ins. Co., 90 Ill. 483; Munn v. Buyer, 70 Ill. 604; McCagg v. Heacock, 34 Ill.

476; s. c. 85 Am. Dec. 327; Lynch v. Jackson, 28 Ill. App. 160; Lindsey v. Delano, 78 Iowa 350; s. c. 43 N. W. Rep. 218; Hurn v. Hill, 70 Iowa 38; s. c. 29 N. W. Rep. 796; Sterling Manfg. Co. v. Early, 69 Iowa 94; s. c. 28 N. W. Rep. 458; Wakefield v. Rotherham, 67 Iowa 444; s. c. 25 (1593)

In the absence of any statute regulating, it rests in the sound discretion of a court of equity, governed by the

N. W. Rep. 697; *Gargon v. Gargon*, 47 Iowa 180; *Mayer v. Farmers' Bank*, 44 Iowa 212; *Crawford v. Taylor*, 42 Iowa 260; *Flucher v. Hiatt*, 23 Iowa 327; s. c. 90 Am. Dec. 440; *Sheldon v. Pruessner*, 52 Kan. 593; s. c. 35 Pac. Rep. 204; *Henkel v. Mix*, 38 La. Am. 271; *Emmons v. Van Zee*, 78 Mich. 171; s. c. 43 N. W. Rep. 1100; *Newman v. Locke*, 66 Mich. 27; s. c. 66 N. W. Rep. 27; *McHugh v. Wells*, 39 Mich. 175; *Gates v. Ege*, 57 Minn. 465; s. c. 59 N. W. Rep. 495; *Parsons v. Noggle*, 23 Minn. 328; *Carroll v. Rossiter*, 10 Minn. 174; *Gordon v. Lewis*, 88 Mo. 378; s. c. 4 West. Rep. 403; *Reilly v. Phillips*, 4 S. D. 604; s. c. 57 N. W. Rep. 780; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51; bk. 27 L. ed. 648; s. c. 2 Sup. Ct. Rep. 236; *Mason v. Northwestern Mut. L. Ins. Co.*, 106 U. S. 163; bk. 27 L. ed. 129; s. c. 1 Sup. Ct. Rep. 165; *Burley v. Flint*, 105 U. S. 247; bk. 26 L. ed. 986; *Swift v. Smith*, 102 U. S. 442; bk. 26 L. ed. 986; *Orvis v. Powell*, 98 U. S. 176; bk. 25 L. ed. 238; *Allis v. Northwestern Mut. L. Ins. Co.*, 97 U. S. 144; bk. 24 L. ed. 1008; *Birne v. Hartford Fire Ins. Co.*, 96 U. S. 677; bk. 24 L. ed. 858; *Howard v. Bugbee*, 65 U. S. (24 How.) 461; bk. 16 L. ed. 753; *Simmons v. Taylor*, 38 Fed. Rep. 682; *Blair v. Chicago, etc., R. Co.*, 12 Fed. Rep. 750; *National Permanent Mut. Benef. Bldg. Soc. v. Paper* (1892), 1 Ch. 54.

In **Arkansas** the time within which to redeem is one year, whether the debt be for purchase money or otherwise. *Wood v. Holland*, 53 Ark. 69; s. c. 13 S. W. Rep. 739.

In **California** redemption from sale made under valid foreclosure proceedings is restricted to six months by Code Civ. Proc. § 702, *Collins v. Scott*, 100 Cal. 446; s. c. 34 Pac. Rep. 1082.

In **Illinois** the owner of a claim allowed against an estate must take the special execution provided for in Ill. Stat. chap. 77, 27, within seven years from the time the claim is allowed, in order to redeem from a foreclosure sale of land of the deceased debtor. *McIlwain v. Karstens*, 152 Ill. 135; s. c. 38 N. E. Rep. 555.

In **Iowa**, in the case of *Wakefield v. Rotherham*, 67 Iowa 444; s. c. 25 N. W. Rep. 697, the owner of land sold to the county on foreclosure of a school fund mortgage in Iowa, paid to the clerk, to redeem the amount demanded by the clerk supposing that he was paying all that was due, while in fact the amount was a few dollars short. The court held that after the year allowed by the statute for redemption, he could pay the balance and redeem, although the purchaser had obtained a sheriff's deed on his certificate of purchase.

In **Michigan** the right of redemption from foreclosure sale under advertisement is defeated by gross laches. *Emmons v. Van Zee*, 78 Mich. 171; s. c. 43 N. W. Rep. 1100.

In **Minnesota** one year in which to redeem is given by the statute (Minn. Gen. Stat. 1878, c. 81, §§ 13, 14) and an action to redeem will be dismissed where it clearly appears to the court that the plaintiff has permitted the period fixed by statute to elapse before commencing proceedings. *Gates v. Ege*, 57 Minn. 465; s. c. 59 N. W. Rep.

equities of each case, to name\*the time within which it will let in a party to a mortgage foreclosure to redeem.<sup>1</sup> The party

495. *Parsons v. Naggle*, 23 Minn. 328; *Allis v. Northwestern Mut. L. Ins. Co.* 97 U. S. 144; bk. 24 L. ed. 1008.

The supreme court in the case of *Parsons v. Naggle*, 23 Minn. 328, say that the time within which an action to redeem must be brought is, in analogy of the statute of limiting the time for commencing an action to foreclose, is ten years; and the time for the mortgagor to bring his action to redeem is not extended by the fact that, owing to the mortgagor being out of the state, the mortgagee may bring his action to foreclose after ten years.

Under this statute it is said that a decree ordering the master, or making a sale, to deliver to the purchaser a certificate that, unless the property is redeemed within twelve months after the sale, he will be entitled to a deed, gave substantial effect to the equity of redemption secured by the statute, although the court intended to defer the order confirming the sale until the end of the twelve months. *Allis v. Northwestern Mut. L. Ins. Co.*, 97 U. S. 144; bk. 24 L. ed. 1008.

In Missouri the statute of limitations applies to suits redeem. *Gordon v. Lewis*, 88 Mo. 378; s. c. 4 West. Rep. 403.

In South Dakota—Minor liens shown no favors. The court, in *Reilly v. Phillips*, 4 S. D. 604; s. c. 57 N. W. Rep. 780, say that in the absence of any statutory exception in favor of minor heirs, giving them other or further rights than are given by the statute (Dak. Comp. L. 5421,) fixing a definite time for redemption after sale under a power contained in

a real estate mortgage, no relief can be granted such heirs after the time for redemption has expired.

**Widows are excepted from the general rule** in some states. Thus the supreme court of Indiana, in the case of *Bar v. Valentine*, 120 Ind. 590; s. c. 22 N. E. Rep. 965, say that widow is entitled to fifteen years from the death of her husband in which to redeem from a foreclosure of a mortgage given by her husband alone for the purchase price of land, and foreclosed in his lifetime, where she was not made a party; and she is not bound to make a demand or tender as a condition precedent to bringing an action to redeem.

<sup>1</sup> *Hanna v. Davis*, 112 Mo. 599; s. c. 20 S. W. Rep. 599. See: *Burgess v. Ruggles*, 146 Ill. 506; s. c. 34 N. E. Rep. 1036; *Bremer v. Calumet & C. Canal & D. Co.*, 127 Ill. 464; s. c. 18 N. E. Rep. 321; *Decker v. Patton*, 120 Ill. 464; s. c. 11 N. E. Rep. 897; 9 West. Rep. 501, aff'g. 20 Ill. App. 210; *Moynusson v. Charlson*, 32 Ill. App. 580; *Gleiser v. McGregor*, 85 Iowa 489; s. c. 52 N. W. Rep. 306; *Flanders v. Hall*, 159 Mass. 95; s. c. 34 N. E. Rep. 178; *Mules v. Stehle*, 22 Neb. 740; s. c. 36 N. W. Rep. 142; *Smith v. Hesketh*, L. R. 44 Ch. Div. 161.

In Illinois the time usually adopted is six months (*Bremer v. Calumet & C. Canal & D. Co.*, 127 Ill. 464; s. c. 18 N. E. Rep. 321; *Decker v. Patton*, 120 Ill. 464; s. c. 11 N. E. Rep. 897; 9 West. Rep. 501, aff'g. 20 Ill. App. 210), but the time rests in the sound discretion of the court in view of all of the circumstances. *Bremer v.*

seeking to redeem from an equitable mortgage cannot object to the shortness of the time fixed by the court, for the reason that he is regarded as bringing in and tendering the amount that shall be found due.<sup>1</sup> Hence a decree passing upon certain questions and effectually foreclosing certain mortgages, fixing the time within which the redemption shall take place, effectually bars an action brought after such time by the parties or their privies, in which the same matters are presented.<sup>2</sup> Should the party, through his own carelessness, fail to know the time within which redemption is to be made is not entitled to relief in equity.<sup>3</sup> Thus, it has

Calumet & C. Canal & D. Co. 127 Ill. 464; s. c. 18 N. E. Rep. 321.

In Iowa it is held that six months is a reasonable time within which redemption may be made where occupied and held by another as security for a debt. *Gleiser v. McGregor*, 85 Iowa 489; s. c. 52 N. W. Rep. 366.

In Nebraska it is said that where a purchaser in good faith under a decree of foreclosure of a senior mortgage files a bill to require a junior incumbrancer, not a party to the action, to redeem within a day to be named, or be barred of the right, and it does not appear that the premises, if sold, would satisfy the liens prior to that of the junior incumbrance, a decree of strict foreclosure may be rendered requiring such junior incumbrancer to redeem the prior incumbrances within a reasonable time, to be named in the decree, or be barred of the right of redemption. *Miles v. Stehle*, 22 Neb. 740; s. c. 36 N. W. Rep. 142.

In New Hampshire a year is the time usually fixed. *Murphy v. New Hampshire Savings Bank*, 63 N. H. 362.

In England, where the plaintiffs in a foreclosure action were first and third mortgagees, and the second incumbrancer was a jointress, and there

were several subsequent mortgagees, an order was made giving the jointress six months to redeem; in case she did redeem, giving three months to the plaintiffs, as third mortgagees, to redeem subject to the jointure, and a third period of three months to the subsequent incumbrancers; but if she did not redeem, giving them a second period only of three months. *Smithett v. Hesketh*, L. R. 44 Ch. Div. 161.

<sup>1</sup> *Hagmusson v. Charlson*, 32 Ill. App. 580.

<sup>2</sup> *Flanders v. Hall*, 159 Mass. 95; s. c. 34 N. E. Rep. 178. See: *Burgess v. Ruggles*, 146 Ill. 506; s. c. 34 N. E. Rep. 1035; *Francis v. Parks*, 55 Vt. 80; *Parker v. Oacres*, 130 U. S. 43 bk. 32 L. ed. 848; s. c. 9 Sup. Ct. Rep. 433.

<sup>3</sup> *Francis v. Parks*, 55 Vt. 80. See: *Burgess v. Ruggles*, 146 Ill. 506; s. c. 34 N. E. Rep. 1035; *Parker v. Oacres*, 130 U. S. 43; bk. 32 L. ed. 848; s. c. 9 Sup. Ct. Rep. 433.

A court of equity should refuse aid, say the United States supreme court, in the case of *Parker v. Oacres*, *supra*, to a party asserting, under the state of Washington Territory, a right of redemption, who has neglected, without sufficient cause, before the

recently been held by the supreme court of Illinois, in the case of *Burgess v. Ruggles*,<sup>1</sup> that a mortgagor who fails to execute a right given him by a decree against a voidable sale, allowing him to redeem within a certain time, loses all right of redemption, and cannot secure such right by having a decree in behalf of a purchaser under levy upon his supposed interest adjudged to be in his favor and for his benefit. It is said in *Kalscheuer v. Upton*,<sup>2</sup> that a provision as to the redemption from prior lienholders "at any time after the claim is due," is for their benefit, and can be waived by them if they choose to do so by accepting payment of claims before they are due.

§ 996. *Before maturity.*—The general rule is that the right of redemption cannot be enforced until the mortgage debt is due,<sup>3</sup> and this is true even though the interest for the full time be paid or tendered,<sup>4</sup> unless by the terms of the instrument the debt is made payable "at or before" a certain day, in which case redemption may be made at any time.<sup>5</sup> In such a case the mortgagor cannot be compelled to keep the money and pay interest until the day specified by the mortgage.<sup>6</sup>

But the supreme court of Iowa, in the case of *Wheeler v. Menold*,<sup>7</sup> say that a junior mortgagee of lands, who was ignorant when he took his mortgage that the payment of

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expiration of six months from the confirmation of the sale, to invoke the authority of the proper court or judge to compel the recognition of such right by the officer whose duty it was, under the statute, to accept a tender made in conformity with the law.

<sup>1</sup> 146 Ill. 506; s. c. 34 N. E. Rep. 1035.

<sup>2</sup> 43 N. W. Rep. 816 (1889).

<sup>3</sup> See: *Abbe v. Goodwin*, 7 Conn. 377; *Saunders v. Frost*, 22 Mass. (5 Pick.) 267; s. c. 16 Am. Dec. 394; *Kingman v. Pierce*, 17 Mass. 247; *In re John. & Cherry Sts.*, 19 Wend. (N. Y.) 659; *Moore v. Cord*, 14 Wis.

213; *Brown v. Cole*, 14 Sim. 426; s. c. 14 L. R. (N. S.) Ch. 168.

<sup>4</sup> The reason for this rule has been said to be because mortgagees generally advance their money as an investment, and, if mortgagors were allowed to pay off their mortgage money at any time after the execution of the mortgage, it might be attended with extreme inconvenience to mortgagees. *Brown v. Cole*, 14 L. J. (N. S.) Ch. 168.

<sup>5</sup> *In re John. & Cherry Sts.*, 19 Wend. (N. Y.) 659.

<sup>6</sup> *Id.*

<sup>7</sup> 81 Iowa 647; s. c. 47 N. W. Rep. 871.



debts secured by senior mortgages had been extended after maturity, can enforce his right to redeem and foreclose before the maturity of the debts under the new contract, as he is not bound by the contract of extension.

§ 997. **After maturity—Before foreclosure.**—The right to redeem being a right to pay the debt and have the lien discharged, it is thought that this may be done at any time before foreclosure; but this is a matter controlled almost entirely by local statutes, the provisions of which must be looked to in each instance.<sup>1</sup> Thus, in California,<sup>2</sup> the mortgagor is entitled to redeem at any time after the principal obligation becomes due, regardless of the statute of limitations.<sup>3</sup> And in Massachusetts,<sup>4</sup> under a mortgage with a power of sale, the mortgagor may, after breach of the condition but before a sale without a previous tender, bring a bill in equity to redeem the land, offering in it to pay what is due.<sup>5</sup>

§ 998. **Same—Same—When mortgagor remains in possession.**—It is thought that the right of redemption is not lost by lapse of time when the mortgagor remains in possession, and occupies for himself and not for the mortgagee. This doctrine was laid down by the supreme judicial court of Maine, in the case of *Bird v. Keller*,<sup>6</sup> and the court say: "It is, however, claimed that the right of redemption is barred by lapse of time, which, under a certain state of facts, might occur. So a lapse of time of sufficient length would raise a presumption of payment. But both these facts do not exist in relation to the same mortgage at the same time. Whether the one or the other will prevail, must depend upon the possession. If the mortgagor were in possession for twenty years after the debt became payable, the presumption of payment would follow. Perhaps the same result might follow if the mort-

<sup>1</sup> See: *Parker v. Dacres*, 130 U. S. 43; bk. 32 L. ed. 848; s. c. 9 Sup. Ct. Rep. 433.

<sup>2</sup> Under Cal. Civ. Code, § 2903.

<sup>3</sup> *Hall v. Arnott*, 80 Cal. 348; s. c. 22 Pac. Rep. 500.

<sup>4</sup> Under Mass. Pub. St., c. 181, § 27.

<sup>5</sup> *Way v. Mullett*, 143 Mass. 49.

<sup>6</sup> 77 Me. 270, 273.

gagee were not in possession. But if the mortgagee were in possession for the same length of time, there would be a presumption of foreclosure. From the report in this case it appears that the \* \* \* mortgagee continued to hold and occupy as before ; taking the rents and profits without accounting for them or paying rent, or being called upon to do either. \* \* \* Thus, for twenty years after the attempted foreclosure, the premises were in the actual possession of one of the mortgagors, which would not only prevent the completion of the foreclosure, but raises the presumption of payment."

§ 999. **After foreclosure—Generally.**—When the mortgagor is permitted to redeem after foreclosure, it will be only upon the full payment of the mortgage debt, interest and costs ; and not upon repayment merely of the amount for which the premises sold, in those cases where they bring less than the full amount of the mortgage debt.<sup>1</sup>

The redemption law in force at the time of the rendition of a judgment foreclosing a mortgage, governs in respect to the time within which the redemption may be made, and not the law in force at the time of the attempted redemption.<sup>2</sup> But the existing laws with reference to which the mortgagor and mortgagee must be assumed to have contracted, are those only which, in their direct or necessary legal operation, controlled or affected the obligation of their contract, and do not include laws changing the rate of interest on bids to be paid, upon redemption, to the purchaser at foreclosure sale.<sup>3</sup> It has been said that a state statute which allows the mortgagor twelve months to redeem after a sale on foreclosure, and his judgment creditor three months after that, governs to that extent the mode of transferring the

<sup>1</sup> *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381; s. c. 25 N. E. Rep. 558; 9 L. R. A. 676; *Duke v. Beeson*, 79 Ind. 24; *Johnson v. Harrison*, 19 Iowa 56; *Powers v. Golden Lumber Co.*, 43 Mich. 468; s. c. 5 N. W. Rep. 656; *Martin v. Fridley*, 23 Minn. 13; *Ravner v. Selmes*, 52 N. Y. 579; Col-

*lins v. Riggs*, 81 U. S. (14 Wall.) 491; bk. 20 L. ed. 723.

<sup>2</sup> *Sheldon v. Pruessner*, 52 Kan. 593; s. c. 35 Pac. Rep. 204.

<sup>3</sup> *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51; bk. 27 L. ed. 648.

title, and confers a substantial right, and thereby become a rule of property.<sup>1</sup> That the Statute of Limitations applies to a suit to redeem is well settled; and a mortgagee in possession, resisting enforcement by the mortgagor of the equity of redemption, for the period of limitation will bar enforcement by the mortgagor of his equity of redemption.<sup>2</sup>

§ 1000. **Same—After lapse of years.**—It is thought that persons seeking to enforce the right, after the lapse of many years and the intervention of other interests, to redeem property notwithstanding a sale under the foreclosure of prior mortgages, must have substantial merit in their cause, and come before the court with clean hands.<sup>3</sup> The time within which an action to redeem must, as a general rule, be brought, is, in analogy to the statute limiting the time for commencing an action to foreclose, for the statute of limitations<sup>4</sup> applies to suits to redeem.<sup>5</sup> As a usual thing such suits cannot be maintained after ten years from the date when the right of action accrued,<sup>6</sup> and in no state after twenty years of peaceable and adverse possession.<sup>7</sup> And the time within which the mortgagor may bring his action to redeem is not extended by the fact that, owing to the mortgagor being out of the state, the mortgagee may bring his action to foreclose after the expiration of ten years.<sup>8</sup>

§ 1001. **Same—Computation of time.**—In redemption of mortgages time is computed by excluding the first day upon which the mortgage falls due and including the last day of the time of redemption.<sup>9</sup> So where mortgaged premises

<sup>1</sup> *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627; s. c. 24 L. ed. 858.

<sup>2</sup> *Gordon v. Lewis*, 88 Mo. 378; s. c. 4 West. Rep. 403.

<sup>3</sup> *Simmons v. Taylor*, 38 Fed. Rep. 682.

<sup>4</sup> See: *Post*, § 1108.

<sup>5</sup> See: *Munn v. Burges*, 70 Ill. 604; *Crawford v. Taylor*, 42 Iowa 260; *Parsons v. Naggle*, 23 Minn. 328; *Gordon v. Lewis*, 88 Mo. 378; s. c. 4 West. Rep. 403.

<sup>6</sup> *Crawford v. Taylor*, 42 Iowa 260; See: *Munn v. Burges*, 70 Ill. 604, 661.

<sup>7</sup> See: *Post*, § 1111.

<sup>8</sup> *Parsons v. Naggle*, 23 Minn. 328.

<sup>9</sup> *Owen v. Slatter*, 26 Ala. 547; s. c. 62 Am. Dec. 745; *Blackman v. Nearing*, 43 Conn. 53; *Weeks v. Hull*, 19 Conn. 376; s. c. 50 Am. Dec. 249; *Avery v. Stewart*, 2 Conn. 69; s. c. 7 Am. Dec. 240; *Teucher v. Hiatt*, 23 Iowa 527; *Smith v. Cassity*, 9 B. Mon. (Kv.) 192; s. c. 48 Am. Dec. 420:

have been sold at foreclosure sale on a certain day, the redemptioner has until the last moment of the same day of the succeeding year (or other limited time) in which to redeem.<sup>1</sup> In those cases where the last day falls on Sunday, it is thought that a redemption on the following Monday will be in time.<sup>2</sup> The reason is founded in public policy, and the maxim *dies non juridicus* is given a liberal construction and effect, so as to embrace in it that which may be deemed

*Beamis v. Leonard*, 118 Mass. 508; *Warren v. Slade*, 23 Mich. 6; *Ex parte Dean*, 2 Cow. (N. Y.) 605; s. c. 14 Am. Dec. 521; *Cromlin v. Brink*, 29 Pa. St. 525; *Barber v. Chandler*, 17 Pa. St. 48; s. c. 55 Am. Dec. 533; *Jones v. Planters Bank*, 5 Humph. (Tenn.) 619; s. c. 42 Am. Dec. 471.

In the case of *Teucher v. Britt*, *supra*, the court say that at common law, the rule as to computation of time was not uniform. In certain cases the day of the act done, or happening of the event, was included; as, where a sheriff was not to be called upon to return process after six months from the expiration of his office. *King v. Adderly*, Doug. (2d ed.) 463. In computing time from an act of bankruptcy; in the limitation of actions against the hundred upon the statute of hue and cry; to prevent a descent from barring an entry (Co. Lit. 255 a), etc. But the more general rule was to exclude the day, although, each case was made to depend upon the reason of the thing, according to its circumstances. *Teucher v. Hiatt*, 23 Iowa 527; s. c. 92 Am. Dec. 440. See: *Pease v. Norton*, 6 Me. (6 Greenl.) 233; *Windsor v. China*, 4 Me. (4 Greenl.) 304; *Wheeler v. Bent*, 21 Mass. (4 Pick.) 167; *Bigelow v. Wilson*, 18 Mass. (1 Pick.) 485; *Portland Bank v. Maine Bank*, 11 Mass. 205; *Henry v. Jones*, 8 Mass. 153; *Rand v. Rand*, 4 N. H. 267;

*Priest v. Tarlton*, 3 N. H. 93; *Ex parte Dean*, 2 Cow. (N. Y.) 605; s. c. 14 Am. Dec. 521; *Snyder v. Warren*, 2 Cow. (N. Y.) 514; s. c. 14 Am. Dec. 519; *Gillispie v. White*, 16 John. (N. Y.) 117; *Hoffman v. Deul*, 5 John. Ch. (N. Y.) 232; *Simms v. Hampton*, 1 Surg. & R. (Pa.) 411.

<sup>1</sup> *Teucher v. Hiatt*, 23 Iowa, 527, s. c. 92 Am. Dec. 440.

<sup>2</sup> See: *Stibbins v. Anthony*, 5 Cal. 348; *Avery v. Stewart*, 2 Conn. 69; *Baxley v. Bennett*, 33 Ga. 146; *Shaw v. Williams*, 87 Ind. 153; s. c. 23. Alb. L. J. 68; *Ormsby v. Louisville*, 79 Ky. 197; s. c. 20 Am. L. Reg. 269; *Cressey v. Parks*, 75 Me. 387; s. c. 46 Am. Rep. 406; *Hammond v. American Mut. L. Ins. Co.* 76 Mass. (10 Gray) 306; *Thayer v. Felt*, 21 Mass. (4 Pick.) 354; *Kuntz v. Temple*, 43 Mo. 71; *Ansonio Brass & Copper Co. v. Conner*, 103 N. Y. 509; s. c. 9 N. E. Rep. 238; 5 Cent. Rep. 403; *Campbell v. International L. Assur. Soc. Co.*, 4 Bosw. (N. Y.) 299; *Anonymous*, 2 Hill (N. Y.) 375; *Howard v. Ives*, 1 Hill (N. Y.) 263; *Whipple v. Williams*, 4 How. (N. Y.) Pr. 28; *Van Vechten v. Paddock*, 12 John. (N. Y.) 178; *Salter v. Bart*, 25 Wend. (N. Y.) 205; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *Barrett v. Allen*, 10 Ohio St. 426; *Edmundson v. Wragg*, 104 Pa. St. 500; s. c. 49 Am. Rep. 590; *Barnes v. Eddy*, 12 R. I. 25.

within its purpose and meaning.<sup>1</sup> It is now well established that the observance of the Sabbath day is such a right which may be enjoined without molestations by transactions of a secular character. Hence Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and, when the performance of a contract is due on Sunday, that performance on the Monday following is in time.<sup>2</sup> Thus it has been held that Sunday is to be deemed a *dies non* in determining a creditor's right to redeem the premises sold on execution from a prior redeeming creditor under a statute requiring him to redeem within twenty-four hours after the former redeems, where his redemption must be made at the sheriff's office, which the law does not require to be kept open on Sunday; and that in such a case a redemption made on the following Monday will be sufficient.<sup>3</sup>

§ 1002. **Same—By junior lienholder.** — Junior lienholders will not, in the absence of any circumstance calling upon a court of equity to exercise its discretion, have any right to redeem after the lapse of the period fixed by statute.<sup>4</sup> The time allowed for redemption, where not fixed by statute, is in the sound discretion of the court.<sup>5</sup> In Iowa, a junior judgment lienholder, made a defendant to a mortgage foreclosure, has no right to redeem after nine months from the date of the sale; but if he does redeem after that time, and obtains an assignment of the certificate, and offers, of record, to take the land for the full amount due, such transaction entitles him to the rights and title of the holder

<sup>1</sup> Porter v. Pierce, 120 N. Y. 217; s. c. 24 N. E. Rep. 281; 7 L. R. A. 847; Fiend v. Park, 20 John. Ch. (N. Y.) 140; Van Vechten v. Paddock; 12 John. (N. Y.) 178.

<sup>2</sup> Porter v. Pierce, 120 N. Y. 217; s. c. 24 N. E. Rep. 281; 7 L. R. A. 847; Avery v. Stewart, 2 Conn. 69; s. c. 7 Am. Dec. 240; Campbell v. International L. Assur. Soc., 4 Bosw. (N. Y.) 299; Howard v. Ives, 1 Hill (N. Y.) 263; Salter v. Burt, 20 Wend. (N. Y.) 205.

<sup>3</sup> Porter v. Pierce, 120 N. Y. 217; s. c. 24 N. E. Rep. 281; 7 L. R. A. 847.

<sup>4</sup> See: Lindsey v. Delano, 78 Iowa 350; s. c. 43 N. W. Rep. 218; Hurn v. Hill, 70 Iowa 38; s. c. 29 N. W. Rep. 796; Sterling Mfg. Co. v. Early, 69 Iowa 94; s. c. 28 N. W. Rep. 458.

<sup>5</sup> Bremer v. Calumet & C. Canal & D. Co., 127 Ill. 464; s. c. 18 N. E. Rep. 321.



of the certificate.<sup>1</sup> It has been said that the holder of a junior judgment has no right to redeem from a sale under the foreclosure of a senior mortgage, after the statutory time for redemption has expired, even though he is not made a party to the foreclosure, if his judgment is not indexed at the time of the foreclosure, unless the plaintiff in foreclosure has actual notice of the judgment at the time of foreclosure; the reason for this is the fact that third persons cannot be charged with constructive notice of a judgment unless it is correctly indexed.<sup>2</sup>

In those cases where a subsequent incumbrancer, having knowledge of all the facts in connection with the foreclosure of a prior mortgage, declined to redeem on the ground that the property was not of sufficient value, he will not, six years thereafter, be allowed to redeem from a *bona fide* purchaser who has made improvements.<sup>3</sup>

§ 1003. Same—Receipt of rents and profits by mortgagee—Effect on right.—The English chancery court, in the case of the National Permanent Mutual Benefit Building Society v. Raper,<sup>4</sup> say that an order for final foreclosure of a mortgage will be made without further account and fresh period of redemption, notwithstanding the receipt by the mortgagee of rents after default has been made in payment of the principal and interest of the mortgage on the day fixed for redemption, but before the affidavit of such default is sworn.

§ 1004. Same—Fraud—Effect on redemption.—It is a well established principle of law, which we have heretofore discussed,<sup>5</sup> that fraud vitiates everything into which it enters. The right of redemption of mortgaged premises restricted, by statute, to a particular time from the date of default, or of a sale under mortgage foreclosure proceedings, determines the right, for the law in force at the rendition of

<sup>1</sup> Lindsey v. Delano, 78 Iowa 350; s. c. 43 N. W. Rep. 218; Hurn v. Hill, 70 Iowa 38; s. c. 29 N. W. Rep. 796.

<sup>2</sup> Sterling Mfg. Co. v. Early, 69 Iowa 94; s. c. 28 N. W. Rep. 458.

<sup>3</sup> Lindsey v. Delano, 78 Iowa 350; s. c. 43 N. W. Rep. 218.

<sup>4</sup> 1 Ch. 54 (1892).

<sup>5</sup> See: Index, tit. "Fraud."

the judgment governs,<sup>1</sup> except in those cases where fraud has intervened, rendering the decree and sale thereunder voidable.<sup>2</sup>

§ 1005. **Extension of time to redeem**—By agreement of parties.—The parties to a mortgage may, by special agreement, fix the time within which redemption may be made, and this agreement will be enforced by the court,<sup>3</sup> within the time designated in the contract,<sup>4</sup> even though the time of redemption be extended beyond the time limited by statute,<sup>5</sup> in those cases where the agreement for extension is made while the right to redeem exists,<sup>6</sup> provided the mortgaged property is ultimately, and within a

<sup>1</sup> Collins v. Scott, 100 Cal. 446; s. c. 34 Pac. Rep. 1082; Sheldon v. Pruessner, 52 Kan. 593; s. c. 35 Pac. Rep. 204. See: *Ante*, § 999.

<sup>2</sup> Collins v. Scott, 100 Cal. 446; s. c. 34 Pac. Rep. 1082.

<sup>3</sup> Nichols v. Otto, 132 Ill. 91; s. c. 23 N. E. Rep. 411; Davis v. Dresback, 81 Ill. 393; Cox v. Ratcliff, 105 Ind. 374; s. c. 5 N. E. Rep. 5; 2 West. Rep. 811; Henkel v. Mix, 38 La. An. 271; Clark v. Crosby, 101 Mass. 184; Allison v. Looms, 29 N.Y.S. R. 617; s. c. 9 N.Y. Supp. 33.

In Louisiana it is held that where an act of sale of land concurs with a counter letter in asserting that the transaction is a sale, and the letter stipulates that the vendor may redeem within a given time, he will lose the right forever, if it be not exercised within the time agreed on. Henkel v. Mix, 38 La. An. 271.

What amounts to an extension of time in which to redeem is sometimes a matter of construction of the terms of the agreement. In the case of Clark v. Crosby, 101 Mass. 184, an agreement by a mortgagee, made three years after his entry to foreclose, to quit-claim the "mortgaged real estate" to a third party if he would pay before a certain day an amount

which was equal to what was due on the mortgage on that day, less the amount of rents received by the mortgagee between the date of such agreement and such payment, was held not to an extension of the right to redeem, though procured by the mortgagor.

In Allison v. Loomis, 9 N. Y. Supp. 33; s. c. 29 N. Y. S. R. 617, upon the formation of a corporation the parties agreed that one should bear half the loss which the other might sustain if in the event the enterprise proved unprofitable, and should also give a deed of lands as security for such loss and a loan; and upon the latter being called upon to make further advances a new unsigned contract was entered into, by which the former resigned as treasurer in favor of the latter, who at the end of five years was to have full possession of the real estate and the former's rights therein to cease in case of a failure to tender one-half of the loss and interest. The court held the second contract valid, and gave the former five years within which to redeem, notwithstanding an abandonment of the business before that time.

<sup>4</sup> Davis v. Dresback, 81 Ill. 393.

<sup>5</sup> *Id.*

<sup>6</sup> Nicholls v. Otto, 132 Ill. 91; s. c.

reasonable period, to be restored to the mortgagor.<sup>1</sup> Where made after default, but during the period allowed by statute for redemption, the contract will be valid, and not being with the statute of frauds, need not be in writing;<sup>2</sup> but where the contract is entered into after the period allowed by statute for redemption has expired, the court will not enforce it, unless the agreement is based on a new consideration.<sup>3</sup> In those cases where the agreement as to the time of the redemption is entered into at the time of making the loan, and inserted in the mortgage or instrument securing the same, it is not necessary that the mortgagee sign the mortgage in order to make the agreement binding upon him,<sup>4</sup> for the reason that both parties are not required to sign a deed of this character, in order that its stipulations shall be binding on them; being a deed *pole*, on acceptance by the grantee it becomes the mutual act of both parties thereto, and, for that reason, binding on them;<sup>5</sup> and it

23 N. E. Rep. 411; *Cox v. Ratcliffe*, 105 Ind. 374; s. c. 5 N. E. Rep. 5; 2 West. Rep. 811.

<sup>1</sup> 2 Jones on Mort. (4th ed.) § 1040.

<sup>2</sup> *Cox v. Ratcliffe*, 105 Ind. 374; s. c. 5 N. E. Rep. 5; 2 West. Rep. 811.

<sup>3</sup> *Nicholls v. Otto*, 132 Ill. 91; s. c. 23 N. E. Rep. 411; *Chase v. McLellan*, 49 Me. 375; *McNew v. Booth*, 42 Mo. 189; *Smalley v. Hickok*, 12 Vt. 153.

<sup>4</sup> *Stowe v. Merrill*, 77 Me. 550; s. c. 1 Atl. Rep. 684; 1 N. Eng. Rep. 291.

<sup>5</sup> *Stowe v. Merrill*, 77 Me. 550; s. c. 1 Atl. Rep. 684; 1 N. Eng. Rep. 291; *Locke v. Homer*, 131 Mass. 93, 102; *Dickason v. Williams*, 129 Mass. 182; *Fenton v. Lord*, 128 Mass. 466; *Coolidge v. Smith*, 125 Mass. 554; *Bronson v. Coffin*, 108 Mass. 175, 186; *Maine v. Cunston*, 98 Mass. 317, 320; *McCabe v. Swap*, 93 Mass. (14 Allen) 188, 193; *Jewett v. Draper*, 88 Mass. (6 Allen) 434; *Bramer v. Dowse*, 66 Mass. (12 Cush.) 277; *Pike v. Brown*, 61 Mass. (7 Cush.) 133; *Bowen v.*

*Comer*, 60 Mass. (6 Cush.) 132, 136; *Newell v. Hill*, 43 Mass. (2 Met.) 181; *Nugent v. Riley*, 42 Mass. (1 Met.) 117; *Guild v. Leonard*, 35 Mass. (18 Pick.) 511; *Minor v. Leland*, 35 Mass. (18 Pick.) 266; *Felch v. Taylor*, 30 Mass. (13 Pick.) 133; *Phelps v. Townsend*, 25 Mass. (8 Pick.) 392; *Swasey v. Little*, 24 Mass. (7 Pick.) 296; *Fletcher v. McFarlane*, 12 Mass. 43, 47; *Goodwin v. Gilbert*, 9 Mass. 510; *Rawson v. Copeland*, 2 Sandf. Ch. (N. Y.) 257; *Rogers v. Eagle Ins. Co.*, 9 Wend. (N. Y.) 611, 618.

In the case of *Locke v. Homer*, 132 Mass. 93, 102, the court say: "By the law of this commonwealth, affirmed by many decisions, the grantee, by the acceptance of the deed, becomes liable to perform, according to its terms, any promise or undertaking therein expressed to be made in his behalf, although not having himself signed the deed, he must, while the old forms of action were retained, have been sued in *assumpsit* and not in *covenant*." Citing: *Coolidge v. Smith*,

is not necessary to insert such agreement in the notice of foreclosure of such mortgage.<sup>1</sup>

129 Mass. 554; *Dickason v. Williams*, 129 Mass. 182, 184; *Fenton v. Lord*, 128 Mass. 466; *Maine v. Cumston*, 98 Mass. 317, 319; *McCabe v. Swap*, 96 Mass. (14 Allen) 188, 193; *Jewett v. Draper*, 88 Mass. (6 Allen) 434; *Braman v. Dowse*, 66 Mass. (12 Cush.) 227; *Pike v. Brown*, 61 Mass. (7 Cush.) 133; *Newell v. Hill*, 43 Mass. (2 Met.) 180; *Guild v. Leonard*, 35 Mass. (18 Pick.) 511; *Phelps v. Townsend*, 25 Mass. (8 Pick.) 392, 394; *Fletcher v. McFarlane*, 12 Mass. 43, 47; *Goodwin v. Gilbert*, 9 Mass. 510. See also *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. (N. Y.) 611; *Rawson v. Copeland*, 2 Sandf. Ch. (N. Y.) 251.

In *Tirrill v. Gage*, 59 Mass. (4 Allen) 245, 256, the supreme judicial court of Massachusetts say: "And hence it has become an established rule, applicable to all transactions, that he who accepts from another anything of value, whether it be real or personal estate, which he knows to be subject to a duty or charge for which he is expected to pay, is presumed thereby to have impliedly contracted to take the duty or charge upon himself." Citing: *Boston & Maine Railroad Company v. Whitcher*, 83 Mass. (1 Allen) 497; *Blanchard v. Page*, 74 Mass. (8 Gray) 181; *Newell v. Hill*, 43 Mass. (2 Met.) 180; *Sheldon v. Purple*, 32 Mass. (15 Pick) 528; *Felch v. Taylor*, 30 Mass. (13 Pick.) 133; *Swasey v. Little*, 24 Mass. (7 Pick.) 296; *Goodwin v. Gilbert*, 9 Mass. 510.

In the case of *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. (N. Y.) 611, 618. the court say: "Whoever takes an estate under a deed, ought, in reason and equity, be obliged to take it on the terms expressed in the deed. It

is said by the court, in *Goodwin v. Gilbert* (99 Mass. 510), that it has long been settled that an action allows for deed reserved in a deed pole, meaning, no doubt, in those cases where the same was accepted by the grantee."

But in the case of *Parish v. Whitney*, 69 Mass. (3 Gray) 516, it was held that a clause in a deed pole, even if purporting to bind the grantee's heirs and assigns, was not a covenant in any sense, and did not create an incumbrance upon the land. The supreme judicial court of Massachusetts, in the case of *Bronson v. Coffin*, 108 Mass. 175, 186, say, regarding these decisions: "If that decision can be supported, it must be as falling within the rules that no easement in or right affecting real estate can be created by contract of the party, except by deed, and that an agreement not sealed by the party who is to perform it cannot create a covenant to run with the land. *Dyer v. Hanford*, 50 Mass. (9 Met.) 395; *Goddard v. Dakin*, 51 Mass. (10 Met.) 94; *Morse v. Copeland*, 68 Mass. (2 Gray) 302; *Maine v. Cumston*, 98 Mass. 317, 320; *Wright v. Wright*, 21 Conn. 329, 342; *Standen v. Christmas*, 10 Q. B. 125; *Bickford v. Parson*, 5 C. B. 920. On the other hand, it has been held in Vermont and New Hampshire that such a promise by the grantee is a deed pole, for the benefit of the adjoining land of the grantor, who retained no other interest in the land granted, was equivalent to a covenant running with the land, and created an incumbrance thereon, *Kellogg v. Robinson*, 6 Vt. 276; *Burbank v. Pillsbury*, 48 N. H. 475."

<sup>1</sup> *Stowe v. Merrill*, 77 N. E. 550; s.c. Atl. Rep. 684; 1 N. Eng. Rep. 291.

§ 1006. Same—By court on statutory foreclosure.—Although the parties to a mortgage may, by proper agreement, either before or after foreclosure, arrange for the extension of the time wherein redemption may be made, yet a court of equity, on a statutory foreclosure, has no power to extend the time allowed in which to redeem, even in those cases where redemption within that time has been prevented by inevitable accident, misfortune or unforeseen calamity;<sup>1</sup> for, although courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end, they have no such power to relieve against statutory foreclosures;<sup>2</sup> and for that reason are powerless by their decrees to extend the time for a redemption on a statutory foreclosure, where redemption is not made within the time provided, no matter what the cause of such failure may be.<sup>3</sup> Thus it has been said that the time for redemption from a valid statutory foreclosure of a mortgage cannot be extended until the determination of a suit by a second mortgagee for an accounting by the first mortgagee for rents and profits received pending the time of redemption, but the amount due must be tendered or paid within the time fixed by the statute, or stipulated by the parties.<sup>4</sup>

§ 1007. Same—By court of equity, when.—The general rule is that a decree of foreclosure regularly enrolled cannot be altered except by a bill of review;<sup>5</sup> but it is thought that a decree by default may be opened to let in a defense on the merits, of which a party has been deprived by the negligence of counsel,<sup>6</sup> or there is anything inequitable in the

<sup>1</sup> *Cameron v. Adams*, 31 Mich. 426; *Dodge v. Brewer*, 31 Mich. 227; *Hoover v. Johnson*, 47 Minn. 434; s. c. 50 N. W. Rep. 475.

<sup>2</sup> *Cameron v. Adams*, 31 Mich. 426.  
<sup>3</sup> *Id.*

<sup>4</sup> *Hoover v. Johnson*, 47 Minn. 434; s. c. 50 N. W. Rep. 475.

<sup>5</sup> *Lillie v. Shaw*, 59 Ill. 77.

<sup>6</sup> *Carter v. Torrance*, 11 Ga. 655; *Herbert v. Rowles*, 38 Md. 279; *Thompson v. Golding*, 87 Mass. (5 Allen) 82; *Day v. Allaire*, 31 N. J. Eq. (4 Stew.) 215; *Embery v. Bergaminne*, 24 N. J. Eq. (9 C. E. Gr.) 229; *Brinkerhoff v. Franklin*, 21 N. J. Eq. (1 Zab.) 334; *Williams v. Sykes*, 13 N. J. Eq. (2 Beas.) 182; *Miller v.*



decree or its results, when the time will be extended within which to redeem.<sup>1</sup> Thus it is said in the case of *Millspau v. McBride*,<sup>2</sup> that a decree of foreclosure by default may be opened even after enrollment to let in a defense that a prior mortgage, alleged in the bill to have been paid by the defendant, was in fact purchased by him, and is entitled to priority of payment, where such defense was prevented by the negligence or mistake of the defendant's solicitor; and this may be done even after the sale has been made under the decree, where the complainant is the purchaser and the property has not been resold to a *bona fide* purchaser without notice. In this case the court say that evidence is admissible, and not open to the objection that it contradicts the record, in case of a bill to obtain an extension of time in which to redeem a mortgage, but not taking notice of a previous decree of foreclosure; where defendants set up such decree and aver that it was rendered upon legal notice to plaintiffs, and with their knowledge and acquiescence, plaintiffs may offer evidence to negative these allegations, and to show that there was no legal notice, nor actual knowledge of the suit.

§ 1008. **Where mortgagee purchases at foreclosure sale.**—The purchase by a mortgagee at his own sale, and the effect upon the rights and liabilities of the parties, has been sufficiently discussed elsewhere;<sup>3</sup> it remains but to call attention to the effect of such purchase upon the right of redemption. It is held in some states that where the mortgagee purchases at his own sale under a power contained in the mortgage, the mortgagor or his grantee, has the optional right to affirm or disaffirm the sale within a

Rusforth, 4 N. J. Eq. (3 H. W. Gr.) 174; *Nash v. Wetmore*, 33 Barb. (N. Y.) 159; *Curtis v. Ballaugh*, 4 Edw. Ch. (N. Y.) 639; *Trip v. Vincent*, 8 Paige Ch. (N. Y.) 180; *Millspau v. McBride*, 7 Paige Ch. (N. Y.) 509; s. c. 34 Am. Dec. 360; *Hazard v. Durant*, 12 R. I. 99; *Erwin v. Vint*, 6 Mumf. (Va.) 267;

*Williams v. Thompson*, 2 Bro. Ch. 280.

<sup>1</sup> *Seymour v. Davis*, 35 Conn. 271; *Bridgeport Savings Bank v. Eldridge*, 28 Conn. 566; s. c. 73 Am. Dec. 688.

<sup>2</sup> 7 Paige Ch. (N. Y.) 509; s. c. 34 Am. Dec. 360.

<sup>3</sup> See *Ante*, § 521.

reasonable time and maintain a bill to redeem ;<sup>1</sup> and in the absence of special circumstances controlling two years is held to be a reasonable time.<sup>2</sup> The supreme court of Michigan, in the case of *Dodge v. Breme*,<sup>3</sup> say that where a mortgage has been foreclosed by advertisement and the premises bid in by the mortgagee, but, before the redemption ran out, an arrangement was made between the mortgagee-purchaser and the mortgagor to extend the time, and payments have been made and accepted on the strength of the agreement, the foreclosure sale and deed are thereby superseded and rendered abortive.

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<sup>1</sup> *Thomas v. Jones*, 84 Ala. 302;  
s. c. 4 So. Rep. 270; *Ezzell v. Watson*,  
83 Ala. 120; s. c. 3 So. Rep. 309.

<sup>2</sup> *Ezzell v. Watson*, 83 Ala. 120;  
s. c. 3 So. Rep. 309.  
<sup>3</sup> 31 Mich. 227.

## CHAPTER XLI.

### REDEMPTION—WHEN MAY BE MADE.

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| <p>§ 1009. In general.</p> <p>1010. When allowed—Covenant to repay omitted, no bar to right.</p> <p>1011. Same—On payment of mortgage debt.</p> <p>1012. Same—By grantee.</p> <p>1013. Same—Interest, etc., received, as ground for.</p> <p>1014. Same—Fraud and misrepresentation as ground for.</p> <p>1015. Same—Unforeseen event as ground for.</p> <p>1016. Same—Breach of faith as ground for.</p> <p>1017. Same—After sale to mortgagee.</p> <p>1018. Same—Where interested person not a party to foreclosure.</p> | <p>§ 1019. Same—Where mortgagee takes possession on default.</p> <p>1020. Same—Costs on.</p> <p>1021. When not allowed—Generally.</p> <p>1022. Same—In case of action in another court.</p> <p>1023. Same—In case of appeal, when.</p> <p>1024. Same—In case of fraud, when.</p> <p>1025. Same—In case of owner of part of mortgaged premises.</p> <p>1026. Same—In case of parol agreement.</p> <p>1027. Same—In case of railroads.</p> <p>1028. Same—In case of sale of mortgaged premises.</p> <p>1029. Same—In case of trust.</p> |
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§ 1009. In general.—While it is true, as we have already seen, that the right of redemption is reciprocal with that of foreclosure,<sup>1</sup> yet where that right is lost by laches in failing to redeem within the time specified,<sup>2</sup> or the running

<sup>1</sup> See: *Ante*, § 888.

<sup>2</sup> *McNees v. Swaney*, 50 Mo. 388 ; *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 59 ; *Elmendorf v. Taylor*, 23 U. S. (10 Wheat.) 152, 157 ; bk. 6 L. ed. 289, 291; *Cholmondeley v. Clinton*, 2 Jac. & W. 1 ; s. c. on appeal, *Id.* 189.

Mortgagor has a right, after condition broken, and at any time before his equity is lost by laches, to redeem the land which he has con-

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veyed in pledge, by paying the mortgage debt. This right, however, is a pure equity, cognizable alone by courts of equity. *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 59.

The Missouri supreme court, in the case of *McNees v. Swaney*, 50 Mo. 388, held that the neglect of a mortgagor to redeem his property within the time specified, under the circumstances did not work a forfeiture of his rights.

of the statute of limitations,<sup>1</sup> it cannot be revived by a tender of the amount of the mortgage<sup>2</sup> and interest and a demand for possession of the premises.<sup>3</sup> And where there is a merger of the equity of redemption in the legal estate, the right of redemption is extinguished; but whether a merger takes place where the two estates meet in one person depends upon the intention of that person, and the estates are not merged if he does not so intend.<sup>4</sup> Whether redemption can be made by a part owner,<sup>5</sup> or a junior mortgagee of a part of the premises,<sup>6</sup> is sufficiently discussed in a former chapter, and requires nothing further than a reference at this time.

It is said in *Debney v. Green*,<sup>7</sup> that by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution, a mortgagee does not in general deprive the mortgagor of the right of redemption. But if such judgment and execution are upon an attachment against the mortgagor, as an absconding debtor attempting to defraud the mortgagee of his security, by removing the property out of the state, he shall not be permitted to redeem, under the influence of the maxim "that he who hath done iniquity shall not have equity." And it is said that in those cases where the decree upon foreclosure of a mortgage cuts off all right of redemption, an action to reverse so much of the decree as forecloses the statutory right to redeem cannot be maintained after the time to redeem has passed, in those cases where the complainant has made no offer to redeem.<sup>8</sup>

In the case of *Anson v. Anson*,<sup>9</sup> the court held that a purchaser under proceedings to foreclose a senior mortgage,

<sup>1</sup> *McClagg v. Hancock*, 34 Ill. 476; s. c. 85 Am. Dec. 327; 42 Ill. 153. See: *Ford v. Wilson*, 35 Miss. 490; s. c. 72 Am. Dec. 137; *Webber v. Chapman*, 42 N. H. 326; 80 Am. Dec. 111. See, also, *Post*, c. XLVI.

<sup>2</sup> See: *Post*, § 1036.

<sup>3</sup> *Miner v. Beekman*, 11 Abb. (N. Y.) Pr. N. S. 147; s. c. 42 How. (N. Y.) Pr. 33.

<sup>4</sup> *Knowles v. Lawton*, 13 Ga. 476; s. c. 63 Am. Dec. 290.

<sup>5</sup> See: *Ante*, § 962.

<sup>6</sup> See: *Ante*, § 965.

<sup>7</sup> 4 Hen. & M. (Va) 101; s. c. 4 Am. Dec. 503.

<sup>8</sup> *Burley v. Flint*, 105 U. S. 247; bk. 26 L. ed. 986.

<sup>9</sup> 20 Iowa 55; s. c. 89 Am. Dec. 514.

to which a junior mortgagee is not made a party, cannot, by purchasing the mortgaged premises for taxes, thereby acquire rights which would bar the junior mortgagee from redeeming upon the payment of the proper amount due.<sup>1</sup> And in *Moore v. Andres*,<sup>2</sup> it is said that the equity of redemption acquired from the mortgagor by intermediate purchasers or incumbrancers is not barred by a purchase of the mortgaged premises made by the assignee of the note given for the purchase money, and who is plaintiff in execution under a judgment at law against vendee. A purchase by a stranger would have the same legal effect.

§ 1010. When allowed—Covenant to repay omitted no bar to right.—The right to redeem land sold at judicial sale on mortgage foreclosure is not impaired by the want of a covenant in the mortgage for the repayment of the money secured.<sup>3</sup> A sale under a power in the mortgage may cut off the right to redeem,<sup>4</sup> and for this reason it may become important to determine whether a given sale is a sale under a power contained in a mortgage from which there can be no redemption, or a judicial sale, from which there may be a redemption. In the case of *Chew v. Hyman*,<sup>5</sup> A sold his land to B, subject to a trust deed previously made containing a power of sale. B devised the land to his children upon their coming of age, and gave to his executor the power to sell it for their maintenance, in such manner and upon such terms as to him should seem best. The holder of the bond filed a bill to foreclose, making the executors and the trustee parties defendant, alleging that the latter were unwilling to execute the trust unless under an order of court. The court ordered a sale, and this sale was held to be a judicial sale, and not a sale under the power alone; that the children of B were necessary parties, and that they not having been made parties, were entitled to redeem.

<sup>1</sup> To the same effect is *Wills v. Turkey*, 22 Cal. 373; s. c. 83 Am. Dec. 74. (N. C.) L. 488; s. c. 4 Am. Dec. 576; *King v. King*, 3 Pr. Wm. 358; also 1 Pr. Wm. 271, 291.

<sup>2</sup> 14 Ala. 628; s. c. 60 Am. Dec. 551.

<sup>4</sup> See: *Ante*, § 912.

<sup>3</sup> *Critchén v. Walker*, 1 Murph.

<sup>5</sup> 10 Biss. C. C. 240.



§ 1011. **Same—On payment of mortgage debt.**—The payment of the mortgage debt extinguished the vitality of the lien and the property reverts to the mortgagor or those claiming under him. Consequently a deed of trust expressly providing that it shall be void and the property therein conveyed released upon payment by the grantor of the note secured thereby becomes void and the property reverts in the grantor upon such payment; and it cannot be made a new security for a different purpose by an assignment thereof by the grantee to a third person upon the latter's subsequently making a loan to the grantor.<sup>1</sup> And it is said that the assignment of a lease constituting the defeasance of a deed intended as a mortgage, contrary to the terms of the lease, will not operate as a forfeiture of the right to redeem, where the lease provides for a conveyance to the lessee or his assigns upon payment of the amount of the mortgage.<sup>2</sup>

All the interest of a mortgage being extinguished by payment, it follows that the grantee in a deed given him as security for the purchase money advanced by him to the purchaser cannot refuse, upon repayment of the money, to reconvey along with the land a water right which constituted the principal inducement for the purchase and was intended to be conveyed, on the ground that it was not expressly included in the original contract of purchase and was put into the deed at his suggestion.<sup>3</sup>

§ 1012. **Same—By grantee.**—The right of redemption attaches to the mortgagor and those claiming under him; hence it is said that a certificate of redemption issued in the name of the grantor to a grantee of lands subject to a mortgage under which they were sold, enures to the grantee's use and benefit in those cases where his offer to redeem in his own name, as he had a legal right to do, was refused

<sup>1</sup> Bailey v. Rockafellow, 57 Ark. 216; s. c. 21 S. W. Rep. 227.

<sup>2</sup> Shields v. Russell, 66 Hun (N.Y.) 226; s. c. 20 N. Y. Supp. 909.

<sup>3</sup> Davis v. Hopkins, 18 Colo. 153; s. c. 32 Pac. Rep. 70.

<sup>4</sup> See: *Ante*, §§ 885, 967.

by the sheriff under the direction of the mortgagees, who became the purchasers at the foreclosure sale.<sup>1</sup>

§ 1013. Same—Interest, etc., received as ground for.—As long as the relation of mortgagor and mortgagee remain, and are recognized, the right to redeem attaches.<sup>2</sup> Anything that goes to establish that this relation is recognized may be shown in support of the claim to the right to redeem. Thus it has been said that continuing to receive interest on a mortgage after foreclosure, and to treat the mortgage as still outstanding, keeps the mortgagor's right of redemption alive.<sup>3</sup>

In the case of *Horton v. Moffit*,<sup>4</sup> A and B were tenants in common of the same premises, A owning two twenty-fifths and B twenty-three twenty-fifths, which had been sold under foreclosure. Afterwards, and before the expiration of the time for redemption, the certificate of sale of the premises was assigned to C, who also became by purchase the owner of the interest of A B, who continued in possession of the premises paid to C the back tax and the interest on the price, and the year after paid another year's interest on that sum. The year following this second payment, B paid to the sheriff of the county for the purpose of redeeming the premises from sale, the amount for which they had been sold and one year's interest thereon, of which the sheriff paid, and C received twenty three twenty-fifths, leaving a balance of two twenty-fifths in the sheriff's hands. The court held that before the time to redeem expired, the estate of the purchaser was that of a mortgagee before foreclosure, an equitable estate or interest; that either of the co-tenants might redeem the whole estate from the sale; that C having acquired the purchaser's interest when the relation to co-tenant did not exist, his right was fixed to hold and enforce it for his own benefit; and that there was

<sup>1</sup> *Willis v. Miller*, 23 Oreg. 352; s. c. 31 Pac. Rep. 827.

<sup>2</sup> See: *Lounsbury v. Norton*, 59 Conn. 170; s. c. 22 Atl. Rep. 153; *Horton v. Moffit*, 14 Minn. 289;

*Hyndman v. Hyndman*, 19 Vt. 10; s. c. 46 Am. Dec. 171.

<sup>3</sup> *Lounsbury v. Norton*, 59 Conn. 170; s. c. 22 Atl. Rep. 153.

<sup>4</sup> 14 Minn. 289.

no merger of the estate of C by his acquiring the title to the two twenty-fifths of A.

In the case of *Hyndman v. Hyndman*,<sup>1</sup> A being indebted to B executed to him an absolute deed to his farm, taking back a written defeasance. A received further advances from B until the sum amounted to \$600. They then agreed that B should have the farm for \$800. B gave his note to A for the difference, and A surrendered up his writing of defeasance; but it was agreed verbally between them that B should sell the farm and A to have what he received over \$800 after paying B for his time and trouble. The court held that contract must, in equity, be still considered as a mortgage with a power of sale, and that A should be allowed to redeem the premises upon a bill brought for that purpose.

§ 1014. Same — Fraud and misrepresentation as ground for.—It is a well settled rule of law that fraud vitiates everything into which it enters. Applying this doctrine it has been said that the relation of mortgagor and mortgagee, created by a vendee's taking possession and paying a part of the price under a contract for the purchase of land entitling him to a deed upon full payment therefor, is not changed and his right to redeem lost or defeated by an attornment or execution of a lease by him to the vendor or the latter's grantee subject to the vendee's rights, especially if the lease is obtained by fraud or misapprehension of the facts as to the state of his title.<sup>2</sup> And the supreme court of Illinois, in the case of *Dawson v. Vickory*,<sup>3</sup> say that in an action to foreclose a mortgage, in which a defendant sets up a subsequent conveyance of the premises to him, and that he is entitled to redeem thereunder, such conveyance will be set aside and the mortgagor permitted to redeem,

<sup>1</sup> 19 Vt. 10; s. c. 46 Am. Dec. 171.

<sup>2</sup> *Tant v. Guess*, 37 S. C. 489; s. c. 16 S. E. Rep. 472. See: *Holridge v. Gillespie*, 2 John. Ch. (N.Y.) 30; *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; s. c. *sub nom* *Alexander v. Rodriguez*, bk. 20, L. ed. 406; *Russell*

*v. Southard*, 53 U. S. (17 How.) 139; bk. 13 L. ed. 927; *Webb v. Rorke*, 2 Sch. & L. 661; s. c. 9 Rev. Rep. 122.

<sup>3</sup> 150 Ill. 111; s. c. 37 N. E. Rep. 910.

upon alleging by way of crossbill and proving that the conveyance was obtained by false representations.

§ 1015. **Same—Unforeseen event as ground for.**—In some of the cases the establishing of an unforeseen event preventing payment has been held to raise an equity that justifies letting a party in to redeem.<sup>1</sup> Thus, in *Kopper v. Dyer*,<sup>2</sup> it is said that when a mortgagor is prevented by accident from paying an installment on the day named in a decree of foreclosure, equity will grant relief; but on terms that he satisfy the equitable rights of the other party. And in the case of *Bostwick v. Stiles*,<sup>3</sup> where an uncle of the mortgagor, a man of ample means, had promised the mortgagor that he would provide him with the money necessary to pay the mortgage, which was about to be foreclosed, and the mortgagor relied upon such promise, but the uncle failed to furnish the money, the court held that the mortgagor was prevented from paying the mortgage by an unforeseen event, and that he was entitled to relief in a court of equity; to have the foreclosure opened and be allowed to redeem.

§ 1016. **Same—Breach of faith as ground for.**—It is thought that a breach of faith on the part of the mortgagee or purchaser of the mortgaged property, by which the mortgagor, or those claiming under him, are injured, will furnish ground for letting the injured party in to redeem.<sup>4</sup> Thus, the supreme court of Illinois, in *Union Mutual Life Insurance Company v. White*,<sup>5</sup> say that an oral promise by the president of a corporation holding a trust deed that the debtor shall have time, after foreclosure, to pay the debt thereby secured, if acted on by the debtor, renders the corporation, on thus acquiring the legal title for much less than its

<sup>1</sup> See: *Bartwick v. Stiles*, 35 Conn. 195; *Seymour v. Davis*, 35 Conn. 264; *Kopper v. Dyer*, 59 Vt. 477.

<sup>2</sup> 59 Vt. 477.

<sup>3</sup> 35 Conn. 195. See: *Seymour v. Davis*, 35 Conn. 264.

<sup>4</sup> See: *Union Mutual Life Ins. Co.*

*v. White*, 106 Ill. 67; *Eckerson v. McCulloh*, 39 N. J. Eq. (12 Stew.) 115; *Alexander v. Rodriguez (Villa v. Rodriguez)*, 79 U. S. (12 Wall.) 23; bk. 20 L. ed. 406.

<sup>5</sup> 106 Ill. 67.

value, a trustee holding the title as a mortgage for payment of the debt; and the debtor may yet redeem by paying the sum due, with expenses.<sup>1</sup> The supreme court of the United States, in the case of *Villa v. Rodriguez*,<sup>2</sup> say that where the mortgagee assured the mortgagor, before and after the conveyance, that if he could sell so as to repay him the money secured by the mortgage, he would return the surplus money, or if he could sell a portion sufficient to reimburse him, he would return the unsold portion, he cannot repudiate such assurances upon which his grantors were drawn in to convey.

§ 1017. **Same—After sale to mortgagee.**—The right of a mortgagor, and those claiming under him, to redeem from a mortgage after conveyance of the equity of redemption to the mortgagee, has already been discussed.<sup>3</sup> The right to redeem after such a conveyance, where made without a sufficient consideration, is well established.<sup>4</sup> Thus, it is said, in *Burton v. Perry*,<sup>5</sup> that the conveyance of mortgaged property worth much more than the amount of the mortgage, to the mortgagee, without any consideration, and without the return of the mortgage notes and securities, upon the request of the mortgagee, on the ground that such conveyance was needed by him in a pending suit, in subsequent pleadings in which he sets up his claim as mortgagee, does not extinguish the mortgagor's equity of redemption.

§ 1018. **Same—Where interested person not party to foreclosure.**—We have already seen that all persons who have an interest in the mortgaged property subsequent to the mortgage being foreclosed, must be made parties defendant,

<sup>1</sup> Court of Chancery of New Jersey, in case of *Eckerson v. McCulloh*, 39 N. J. Eq. (12 Stew.) 115, to the same effect. In this case, A's property was to be sold at foreclosure sale. B agreed to bid it in for A's benefit. The court held that A could redeem from B, who, after bidding it in, repudiated the agreement.

<sup>2</sup> 79 U. S. (12 Wall.) 323; *sub nom* LL

*Alexander v. Rodriguez*, bk. 20 L.ed. 406.

<sup>3</sup> See: *Ante*, §907.

<sup>4</sup> *Burton v. Perry*, 146 Ill. 71; s. c. 34 N. E. Rep. 60. See: *Thompson v. Lee*, 31 Ala. 292; *Ennor v. Thompson*, 46 Ill. 214; *Brown v. Gaffney*, 28 Ill. 149; *Russell v. Southard*, 53 U.S. (12 How.) 139; bk. 13 L. ed. 927.

<sup>5</sup> 146 Ill. 71; s. c. 34 N. E. Rep 60.



or their rights will not be affected by the decree of foreclosure and sale thereunder.<sup>1</sup> On this ground it has been said that where lands have been sold under a decree of foreclosure on a senior mortgage, the junior mortgagee, not being a party to the suit, may redeem<sup>2</sup> from the purchaser at the sale, on paying the amount of his bid, with interest and costs, and the value of all permanent improvements erected by him up to the time of the tender, or offer to redeem; and if the tender is refused, the purchaser is chargeable with the value of the rent from the time of the tender and refusal.<sup>3</sup>

But it is said by the Supreme court of Nebraska, in the case of *Miller v. Finn*,<sup>4</sup> that where a foreclosure of a mortgage is had, and the decree completely executed, and the purchase-money paid, and then an incumbrancer who was not made a party to the bill to foreclose brings his action, the right of such incumbrancer to a decree to redeem the premises and receive a conveyance of the land mortgaged is not absolute. In the absence of fraud, the owner of the land under the foreclosure and sale should be protected in his title, subject only to the payment of the creditor's just claim.

**§ 1019. Same—Where mortgagee takes possession on default.**—The right of a mortgagee to take possession

<sup>1</sup> See: *Ante*, § 971.

The supreme court of Connecticut, in the case of *Pritchard v. Elton*, 38 Conn. 434, say that a petition by heirs of a mortgagor, to redeem dismissed, although they were not parties to the foreclosure, on the ground that the mortgagor had released the right of redemption under peculiar circumstances warranting a court of equity in sustaining the release.

<sup>2</sup> As to junior's mortgagee's right to redeem, See: *Ante*, § 965. The right to redeem in such case, is not governed by the limitation of two years, which in Alabama, is the prescribed bar to proceedings under the

statute; but may be asserted at any time while the mortgage is operative. *Wiley v. Ewing*, 47 Ala. 418.

Under the Iowa law, making the interest of the mortgagee not an estate in land but simply a specific lien thereon to secure the debt, which is the principal thing,—the right of a junior mortgagee, who was not made a party to a foreclosure of a prior mortgage, to redeem therefrom, is absolutely barred in ten years. *Gower v. Winchester*, 33 Iowa 303. See: *Hodgen v. Guttery*, 58 Ill. 431.

<sup>3</sup> *Wiley v. Ewing*, 47 Ala. 418. See: *Post*, § 1042.

<sup>4</sup> 1 Neb. 254

of the mortgaged property on default is well established, in the absence of prohibitory statutes. The supreme judicial court of Massachusetts, in the case of *Lamsón v. Drake*,<sup>1</sup> say that a tenant for life of land, on which there is a mortgage overdue, cannot hold possession of the land against the mortgagee, by paying interest as it accrues, nor can he, by paying the amount of the mortgage, compel the mortgagee to assign it to him; but a bill brought for these purposes may be maintained as a bill to redeem, if the plaintiff alleges his willingness to pay the amount due on the mortgage "in such way or upon such other terms as the court may direct," and the answer alleges the defendant's readiness to account as ordered by the court. The same court, in the case of *Haskins v. Hawkes*,<sup>2</sup> say that the heirs at law of a mortgagee, by entering to foreclose, become executors in their own wrong, and the mortgagor to be entitled to a decree against them for redemption, and for the rents and profits to be accounted for by them to an administrator appointed upon the mortgagor's petition, and applied on the mortgage debt.

§ 1020. *Same—Costs on.*—It has been said that a junior mortgagee may redeem from the foreclosure of a senior mortgage, to which action he was not a party, without paying the costs of such suit.<sup>3</sup> But it is thought that a mortgagor who waits until after the advertisement of the property for sale before filing his bill to redeem, although notified several months before that it was advertised for sale under a power in the mortgage, will be required to pay the costs of advertising.<sup>4</sup>

It is said by the supreme judicial court of Massachusetts, in the case of *Hart v. Goldsmith*,<sup>5</sup> that in a suit in equity to redeem a mortgage, if the defendant, by his answer,

<sup>1</sup> 105 Mass. 564.

<sup>2</sup> 108 Mass. 379.

<sup>3</sup> *Gaskell v. Viquesney*, 127 Ind.

244; s. c. 23 N. E. Rep. 791; *Gage*

*v. Brewster*, 31 N. Y. 218. See:

*Post*, § 1013.

<sup>4</sup> *Means v. Anderson*, 19 R. I. (1895); s. c. 32 Atl. Rep. 82.

<sup>5</sup> 83 Mass. (1 Allen) 145. See:

*Smith v. Robinson*, 92 Mass. 130,

132.

claims the performance of an usurious contract, the mortgagor is entitled to the benefit, under the statute, of a forfeiture for usury in reduction of the sum payable upon the mortgage; and if the sum tendered added to the forfeiture equals the amount due on the mortgage, the redemptioner will be entitled to a decree for redemption, without further payment, and for his costs. In the case of *Shield's v. Lozear*,<sup>1</sup> where a tender of the amount due on the mortgage was made after its maturity, and acceptance was refused by the mortgagee in possession, on a bill in equity to redeem, the court held that, under the circumstances, the complainant was entitled to a decree with costs.

§ 1021. When not allowed—Generally.—There are many cases in which redemption is not allowed; among these is case of appeal, where the statute prohibits redemption,<sup>2</sup> or the time allowed for redemption has expired;<sup>3</sup> where the mortgage is fraudulent;<sup>4</sup> where a judgment for deficiency is entered although no indebtedness actually exists, and such judgment is made the basis for proceedings to redeem;<sup>5</sup> where the applicant is the owner, or has an interest in only part of the mortgaged premises;<sup>6</sup> where the right is based on a parol agreement respecting the mortgaged property;<sup>7</sup> in case of the sale of a railroad;<sup>8</sup> in case of sale of the mortgaged property on execution or debt other than the mortgage debt;<sup>9</sup> in cases of trust in which the trustee has acted,<sup>10</sup> and the like.

The supreme court of New York, in the case of *Lewis v. Duane*,<sup>11</sup> say that under a collateral agreement between a mortgagor and mortgagee that the mortgagee is to be

<sup>1</sup> 22 N. J. Eq. (7 C. E. Gr.) 447.

<sup>2</sup> As Iowa Code, § 3102. See: *Lombard v. Gregory*, 90 Iowa 682; s. c. 57 N. W. Rep. 621.

<sup>3</sup> See: *Seymour v. Bailey*, 66 Ill. 233.

<sup>4</sup> See: *Ante*, § 1004; *Post*, § 1024.

<sup>5</sup> *Wetherbee v. Fitch*, 117 Ill. 67;

s. c. 7 N. E. Rep. 513; 7 West. Rep. 220.

<sup>6</sup> See: *Ante*, § 962.

<sup>7</sup> See: *Post*, § 1062.

<sup>8</sup> See: *Post*, § 1027.

<sup>9</sup> See: *Post*, § 1028.

<sup>10</sup> See: *Post*, § 1029.

<sup>11</sup> 69 Hun (N. Y.) 23; s. c. 23 N. Y. Supp. 433; 52 N. Y. S. R. 818.

secured only against liabilities of an unascertained amount, and that the mortgage is to be indorsed or reduced down to the amount when ascertained, the mortgagee is not a trustee for the mortgagor; nor can the latter redeem from a foreclosure had without such ascertainment. And the supreme court of Iowa, in the case of *Lysinger v. Hayer*,<sup>1</sup> say that a senior mortgagor cannot redeem from a junior lien under the Iowa Code,<sup>2</sup> providing that the terms of redemption shall be the reimbursement of the amount paid by the then lienholder, added to the amount of his own lien, with interest and costs, and that when the senior creditor thus redeems from his junior he is required to pay off only the amount of those liens paramount to his own.

§ 1022. Same—In case of action in another court.—It is thought that where land has been mortgaged to secure the deferred payments, the fact that the title of the vendor is attacked in the federal courts will not deprive the state courts in which the land lies of jurisdiction in the matter of the mortgage, and, for that reason, will not stay foreclosure thereof, or extend the time for redemption thereof. Thus, in *Seymour v. Bailey*,<sup>3</sup> the complainant purchased land of A, giving a mortgage to secure the deferred payments, and, after his purchase, without notice of any equitable claim to the land, the administrator of B filed his bill in equity, in the United States circuit court, alleging that this and other lands had been purchased by A with funds furnished by B, on a speculation, to be afterwards sold, and after repayment of the outlay, with interest and taxes, one-half of the profit to be paid to B, praying for an account and that the unsold lands be sold, and for an injunction against A making further sales. No further injunction was in fact ever issued, or a receiver appointed. The complainant was not a party to the suit, and, during its pendency and during the late war, A foreclosed the mortgage, and the premises were sold and purchased by him. After the time of redemption had expired, the complainant

<sup>1</sup> 87 Iowa 335; s. c. 54 N.W. Rep.

<sup>2</sup> Ia. Code, §§ 3166, 3107.

<sup>3</sup> 66 Ill. 288.

filed his bill in chancery to open and set aside the decree of foreclosure and sale, and for redemption of the land. The court held that the pendency of the suit in the United States circuit court afforded no excuse to the complainant in not making his payments, and did not have the effect to deprive the courts of Illinois of jurisdiction to decree a foreclosure of the mortgage, and consequently was no ground for equitable relief against the proceeding to foreclose.

§ 1023. **Same—In case of appeal—When.**—Under the statutes in some of the states the right to redeem is lost by an appeal from a judgment of foreclosure and decree of sale of the mortgaged premises. Thus, it is said, in *Lombard v. Gregory*,<sup>1</sup> that one who appeals from a judgment of foreclosure and sale of land loses the right of redemption although the judgment is reversed under Iowa Code,<sup>2</sup> providing for redemption of land within one year from the day of sale, but that in no action where defendant has taken an appeal from the district court shall he be entitled to redeem.

§ 1024. **Same—In case of fraud—When.**—We have already seen<sup>3</sup> a judgment for deficiency entered where no indebtedness actually exists cannot be used for the purpose of redemption,<sup>4</sup> and it is thought that a fraudulent mortgage creates no equity of redemption in respect to a creditor of the mortgagor, who, by extending his execution in the usual form upon the land mortgaged, elects to treat it as a nullity; and the sale of the equity of the redemption of such mortgage does not convey anything, even to an innocent purchaser without notice of the fraud.<sup>5</sup>

§ 1025. **Same—In case of owner of part of mortgaged premises.**—The general rule is that the owner of a part of the mortgaged premises can make redemption only by pay-

<sup>1</sup> 90 Iowa 632; s. c. 54 N. W. Rep. 621.

<sup>2</sup> Ia. Code, § 3102.

<sup>3</sup> See: *Ante*, § 1004.

<sup>4</sup> *Wetherbee v. Fitch*, 117 Ill. 67;

s. c. 7 N. E. Rep. 513; 4 West. Rep. 220.

<sup>5</sup> *Bullard v. Hinkley*, 6 Me. (6 Greenl.)

289; s. c. 20 Am. Dec. 304.



ing the whole of the mortgage debt.<sup>1</sup> This rule, however, is for the protection of the mortgagee, and will not be applied where the equities of the mortgagee in possession are such that injustice will be done to him if he is compelled to convey the whole premises upon receipt of the mortgage debt.<sup>2</sup>

§ 1026. **Same—In case of parol agreement.**—The supreme court of Kentucky, in *Clark v. Renaker*,<sup>3</sup> say that a right of redemption from a mortgage sale, founded on a parol agreement, should never be enforced unless clearly and satisfactorily proved. The supreme court of Virginia, in the case of *Jordan v. Katz*,<sup>4</sup> say that one in possession of land under a parol agreement by which another who has purchased it is to convey upon repayment of the purchase money, waives all rights under such agreement by subsequently becoming the tenant of the latter and paying rent for the property.

§ 1027. **Same—In case of railroads.**—Under the statutes in some of the states the rules as to redemption on mortgage foreclosures do not apply to railroads sold on mortgage foreclosure. Thus it is said that a railroad, when lawfully mortgaged as an entirety, is not real estate within the Kentucky statute conferring the right to redeem real estate when sold to foreclose a mortgage—especially in view of the provision of the Kentucky constitution,<sup>5</sup> to the effect that the rolling stock of a railroad shall be considered personal property.<sup>6</sup> And it is said in the case of *Hammock v. Farmers' Loan*

<sup>1</sup> *Smith v. Kelley*, 27 Me. 237; s.c. 46 Am. Dec. 595. See: *Ante*, § 885; *Post*, § 1030.

The rule in the supreme court of the United States, as laid down in *Valla v. Rodriguez*, 79 U. S. (12 Wall.) 323; s. c. *sub nom* *Alexander v. Rodriguez*, bk. 20 L. ed. 406, is that one who holds a portion of the title by deed from a portion of the mortgagor's is clothed with their rights, and is entitled to redeem such

portion upon paying a proper proportion of the mortgage debt and interest.

<sup>2</sup> *Shearer v. Field*, 6 Misc. (N. Y.) 189; s. c. 27 N. Y. Supp. 29.

<sup>3</sup> 20 S. W. Rep. 534; s. c. 14 Ky. L. Rep. 465.

<sup>4</sup> 89 Va. 628; s. c. 16 S. E. Rep. 866; 17 Va. L. J. 160.

<sup>5</sup> 1 Am. Const. (1894) 714, § 212.

<sup>6</sup> *Columbia Finance & T. Co. v. Kentucky U. R. Co.*, 60 Fed. Rep. 794.

and Trust Company,<sup>1</sup> that the legislation of Illinois giving the right to redeem mortgaged lands sold under decree does not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, personalty and franchises so mortgaged should be sold as an entirety, and without the right of redemption given by statute.

§ 1028. **Same—In case of sale of mortgaged premises—**The general rule has been said to be that a mortgagor's right to redeem is not prejudiced by any conveyance of the whole or of parts of the mortgaged premises, made by the mortgagee;<sup>2</sup> but in those cases where the mortgagee has taken possession, not simply under his mortgage, but under a valid sheriff's deed on execution against the mortgagor for another than the mortgage debt, there can be no redemption.<sup>3</sup> The supreme court of Arkansas, in the case of *Martin v. Ward*,<sup>4</sup> say that a mortgagor of land has no right to redemption after a decree of foreclosure and sale of land, under the statute of the state,<sup>5</sup> providing that the mortgagee or other person authorized to make a sale under the mortgage shall apply to a justice of the peace for the appointment of appraisers, that the land when first offered for sale shall not be sold for less than two-thirds of its appraised value, and that the land sold thereunder may be redeemed by the mortgagor at any time within a year from the sale, as it applies only to a sale under a power contained in the mortgage.

1029. **Same—In case of trust.**—In the case of *Johnson v. Robertson*,<sup>6</sup> the mortgaged premises were conveyed by a husband to a trustee, for the benefit of his wife. The husband and wife removed from the state, leaving the trustee in the town where the mortgaged property was situated. A bill

<sup>1</sup> 105 U. S. 77; bk. 26. L. ed. 111.

<sup>4</sup> 60 Ark. 510; s. c. 30 S. W. Rep.

<sup>2</sup> *Wilson v. Troup*, 2 Cow. (N. Y.) 1041.

195; s. c. 14 Am. Dec. 458. See: *Ante*, § 922.

<sup>5</sup> Ark. Act, March 17, 1879.

<sup>6</sup> 31 Md. 476.

<sup>3</sup> *Freiknecht v. Meyer*, 38 N. J. Eq. (11 Stew.) 315.

of foreclosure being filed, the trustee appeared, and by answer "submitted to such decree in the premises as might be right." In the decree foreclosing the mortgage, no day was named on which the trustee might redeem. The court held that the trustee having submitted to such decree as might seem right, he had waived the privilege of having a day to bring in the money. Also that the *cestui que trust* was bound by the act of the trustee, and that, in the absence of any evidence of injury to her or the trust estate, she could not be allowed to impeach, or ask a reversal of the decree on that account.

## CHAPTER XLII.

### REDEMPTION—TERMS, CONDITIONS, MODE AND EFFECT.

<p>§ 1030. Amount payable to effect redemption—Discretion of court.</p> <p>1031. Same—Before foreclosure.</p> <p>1032. Same—After foreclosure and sale.</p> <p>1033. Same—Same—Where mortgage to secure further advances.</p> <p>1034. Same—Same—When part only of debt due.</p> <p>1035. Mode of payment and effect.</p> <p>1036. Tender on redemption.</p> <p>1037. Usurious and compound interest.</p> <p>1038. Redeeming whole of mortgaged land.</p>	<p>§ 1039. Redeeming but part of mortgaged land.</p> <p>1040. Requiring reconveyance of other titles.</p> <p>1041. Repairs—Allowance for on redemption.</p> <p>1042. Rents and profits—Accounting for.</p> <p>1043. Payment of costs of suit.</p> <p>1044. Taxes and assessments and disbursements.</p> <p>1045. Surrender of premises under statute.</p> <p>1046. Allowance as attorney fees.</p> <p>1047. Notice of intention to redeem.</p> <p>1048. Payment for improvements.</p> <p>1049. Right to assignment of mortgage.</p>
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§ 1030. Amount payable to effect redemption—Discretion of court.—A court of equity has the discretion, governed by the equities of each case, to name the terms on which and the time within which it will let in a party to a mortgage foreclosure to redeem.<sup>1</sup> The fact that a party seeking to redeem from an equitable mortgage must be regarded as bringing the amount which should be found due into court and tendering the same, he cannot complain of the amount required or the shortness of time fixed by the court for its payment.<sup>2</sup>

§ 1031. Same—Before foreclosure.—One seeking to redeem must pay all sums due under a mortgage,<sup>3</sup> and perform all the conditions.<sup>4</sup> If the person seeking to redeem is

<sup>1</sup> *Hanna v. Davis*, 112 Mo. 599; s. c. 20 S. W. Rep. 686.

<sup>2</sup> *Magnusson v. Charlson*, 32 Ill. App. 580.

<sup>3</sup> See: *Post*, § 1038. (1626)

<sup>4</sup> See: *Gliddon v. Andrews*, 14 Ala. 733; *Andreas v. Hubbard*, 50 Conn. 351; *Seymour v. Davis*, 35 Conn. 264; *Franklin v. Gorham*, 2 Day (Conn.) 42; *Meacham v. Steele*, 93 Ill.

interested in only a portion of the mortgaged premises, he must nevertheless pay the whole debt, because the mortgagee can not be required to separate his claim.<sup>1</sup> The supreme judicial court of Massachusetts, in the case of *Stone v. Ellis*,<sup>2</sup> say that the grantee of an estate upon condition, who mortgages to his grantor, and, after a foreclosure by the mortgagee on breach, files a bill to redeem, he will be allowed to redeem only upon removing all incumbrances specified in the mortgage, and performing the conditions annexed to his deed.<sup>3</sup>

Where a mortgagee has taken possession of the mortgaged premises on breach of condition, the mortgagor or those claiming under him can redeem by paying the whole mortgage debt; because the mortgagee is not compellable to accept a less amount than the whole of his claim, and may retain possession until it is paid;<sup>4</sup> and this is true even when the proceedings to redeem are brought by the grantee of a mortgagor who has obtained a certificate of discharge in proceedings in bankruptcy.<sup>5</sup>

§ 1032. Same—After foreclosure and sale.—In many of the states the right to redeem within a prescribed time after sale under a decree of foreclosure is given by statute. This right, when thus given, is a substantial one, and must be recognized and enforced by all courts, even the United States courts sitting in equity, because the statute consti-

135; *Spurgen v. Adamson*, 62 Iowa 661; s. c. 18 N. W. Rep. 293; *Douglas v. Bishop*, 27 Iowa 216; *Smith v. Kelley*, 27 Me. 237; *Dooley v. Potter*, 146 Mass. 148; *Lamb v. Montague*, 112 Mass. 352; *Merritt v. Hosmer*, 77 Mass. (11 Gray) 272; *McCabe v. Bellows*, 73 Mass. (7 Gray) 148; s. c. 66 Am. Dec. 467; *People v. Fralick*, 12 Mich. 235; *Johnson v. Johnson*, Walk. (Mich.) 331; *Kezer v. Clifford*, 59 N. H. 208; *Fletcher v. Chase*, 16 N. H. 42.

<sup>1</sup> See: *Ante*, § 962; *Post*, § 1032.

<sup>2</sup> 63 Mass. (9 Cush.) 95.

<sup>3</sup> See: *Cowles v. Marble*, 37 Mich. 158.

<sup>4</sup> See: *Wood v. Holland*, 53 Ark. 69; s. c. 13 S. W. Rep. 739; *Fogall v. Pirro*, 17 Abb. (N. Y.) Pr. 113; *Bell v. Mayor, etc., of New York*, 10 Paige Ch. (N. Y.) 49; *Rodriguez v. Haynes*, 76 Tex. 225; s. c. 13 S. W. Rep. 296.

<sup>5</sup> *Stewart v. Anderson*, 10 Ala. 504; *Childs v. Childs*, 10 Ohio St. 339; s. c. 75 Am. Dec. 512; *Steadman v. Gassett*, 18 Vt. 346.



tutes a rule of property in the state that enacts it.<sup>1</sup> The general rule<sup>2</sup> is that under such a statute any person seeking to redeem after foreclosure and sale must pay the full amount of the mortgage debt. In those cases where the mortgaged property has been sold for less than the mortgage debt, it will not be sufficient to tender<sup>3</sup> the amount for which the property sold, together with the interest and costs; but the whole mortgage debt must be tendered or paid into court. The reason for this is because the party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying the full amount of the mortgage debt. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase money, and pay the former the balance of his debt.<sup>4</sup>

In a suit brought to redeem, in ascertaining the amount that is to be paid on redemption, a conditional judgment on a writ of entry to foreclose is conclusive evidence of the amount due on the mortgage.<sup>5</sup> This is upon the familiar principle that a matter in controversy, which has once been inquired into and settled by a court of competent jurisdiction, can not be drawn in question in another suit between the same parties.<sup>6</sup>

<sup>1</sup> *Parker v. Dacres*, 130 U. S. 43; bk. 32 L. ed. 848; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 63; bk. 27 L. ed. 648, 652; s. c. 2 Sup. Ct. Rep. 236; *Mason v. Northwestern Mut. L. Ins. Co.*, 106 U. S. 164; bk. 27 L. ed. 130; s. c. 1 Sup. Ct. Rep. 165; *Hammock v. Farmers L. & T. Co.*, 105 U. S. 77, 88; bk. 26 L. ed. 1111, 1115; *Brine v. Hartford F. Ins. Co.*, 96 U. S. 627; bk. 24 L. ed. 858.

<sup>2</sup> Exceptions to the general rule as here laid down are set out hereafter and fully discussed in § 1039.

<sup>3</sup> As to tender, See: *Post*, § 1036.

<sup>4</sup> *Collins v. Riggs*, 81 U. S. (14 Wall.) 941; bk. 20 L. ed. 723. See:

*Wood v. Holland*, 53 Ark. 69; s. c. 13 S. W. Rep. 739; *McCabe v. Bellows*, 73 Mass. (7 Gray) 148; *Adams v. Brown*, 61 Mass. (7 Cush.) 220; *Barker v. Pierson*, 6 Mich. 522; *Jones v. Van Doren*, 130 U. S. 684, 692; bk. 32 L. ed. 1077, 1080; s. c. 9 Sup. Ct. Rep. 685; *Parker v. Dacres*, 130 U. S. 43; bk. 32 L. ed. 848; s. c. 9 Sup. Ct. Rep. 433.

<sup>5</sup> *Sparhawk v. Wills*, 71 Mass. (5 Gray) 423.

<sup>6</sup> See: *Burke v. Miller*, 70 Mass. (4 Gray) 114; *Greene v. Greene*, 68 Mass. (2 Gray) 364; *Bigelow v. Winsor*, 67 Mass. (1 Gray) 301; *Homes v. Fish*, 18 Mass. (1 Pick.) 439.

§ 1033. **Same—Same—Where mortgage to secure further advances.**—It is a well settled rule of law that a mortgage to secure future advances or services is valid, even when it does not express the object;<sup>1</sup> yet it is thought that where advances are made and services rendered subsequent to a judgment or mortgage lien will be a second lien to such attaching lien.<sup>2</sup> And it is said if further advancements are made by the mortgagee to the mortgagor after the breach of the condition of the mortgage, under an oral agreement that the mortgage shall stand as security for them, a court of equity will not aid the mortgagor, or anyone who has no higher equity than the mortgagor, to redeem without allowing for such advancements according to the agreements and rules of equity between the parties.<sup>3</sup>

§ 1034. **Same—Same—Where part only of debt due.**—Where the condition of the mortgage is that the

<sup>1</sup> *Brinkerhoff v. Marvin*, 5 John Ch. (N. Y.) 320; *Yelverton v. Sheldon*, 2 Sandf. Ch. (N. Y.) 781. See: *Summers v. Roos*, 42 Miss. 778; *Ely v. Parkhurst*, 25 N. J. L. (1 Dutch.) 192; *Ackerman v. Hunsicker*, 85 N. Y. 49; s. c. 39 Am. Rep. 624; 21 Hun (N. Y.) 55; *Cook v. Whipple*, 55 N. Y. 167; s. c. 14 Am. Rep. 213; *Curtis v. Leavitt*, 14 N. Y. 208; *Truscott v. King*, 6 N. Y. 153; *Averill v. Loucks*, 6 Barb. (N. Y.) 22; *Bank of Utica v. Finch*, 3 Barb. (N. Y.) 297; *Hall v. Crouse*, 3 Hun (N. Y.) 563; *James v. Johnson*, 6 John. Ch. (N. Y.) 429; *Craig v. Tappin*, 2 Sandf. Ch. (N. Y.) 84; *Barry v. Merchants Exchange Co.*, 1 Sandf. Ch. (N. Y.) 314; *Bank of Albion v. Burns*, 2 Lans. (N. Y.) 57; *Lansing v. Woodworth*, 2 N. Y. Leg. Obs. 251; *Turbeville v. Gibson*, 5 Heisk (Tenn.) 596; *Jones v. New York Guarantee & I. Co.*, 101 U. S. 626; s. c. 25 L. ed. 1034; *United States v. Lenox*, 2 Paine C. C. 183.

<sup>2</sup> *Ely v. Parkhurst*, 25 N. J. L. (1 Dutch.) 192; *Ackerman v. Hun-*

*sicker*, 85 N. Y. 49; s. c. 39 Am. Rep. 624; 21 Hun (N. Y.) 55; *Curtis v. Leavitt*, 15 N. Y. 208; *Monot v. Ibert*, 33 Hun (N. Y.) 27; *Hall v. Crouse*, 13 Hun (N. Y.) 563; *Yelverton v. Sheldon*, 2 Sandf. Ch. (N. Y.) 781; *Barry v. Merchants Exchange Co.*, 1 Sandf. Ch. (N. Y.) 314; *Terberville v. Gibson*, 5 Heisk. (Tenn.) 597.

<sup>3</sup> *Taft v. Stoddard*, 142 Mass. 545, 550; *Stone v. Lane*, 92 Mass. (10 Allen) 74. See: *Upton v. National Bank of South Reading*, 120 Mass. 153, 156; *Joslyn v. Wyman*, 87 Mass. (5 Allen) 62.

Thus it has been said by the supreme judicial court of Massachusetts, in the case of *Taft v. Stoddard*, 142 Mass. 545, 550, that the same principle is applied when a bill to redeem is brought by one who has taken a conveyance from the mortgagor with a knowledge of the facts. *Stone v. Lane*, 92 Mass. (10 Allen) 74; *Joslyn v. Wyman*, 87 Mass. (5 Allen) 62.

mortgagor shall pay several sums of money at several times, and upon the non-payment of one or more of the sums first falling due the mortgagee enters for condition broken, and the mortgagor, or those claiming under him, wishes to redeem, the mortgagee in possession will not be compelled to accept the money not yet due,<sup>1</sup> but the mortgagor has a right to regain possession and protect his estate by paying or tendering the amount which is due;<sup>2</sup> or the court may make a special decree, upon payment of the sum due, declaring that the proceedings shall stand upon leaving the mortgagee in possession until the further sum or sums shall become due.<sup>3</sup> It is thought that a different rule will prevail where the party taking possession has two or more mortgages upon the same premises, one of which is due and the others not yet due. In such case redemption may be had upon payment of the mortgage that is due.<sup>4</sup>

§ 1035. *Mode of payment and effect.*—A redemption of a mortgage, either before or after foreclosure, can be effected only by a satisfaction of the debt secured together with interest and costs.<sup>5</sup> The money required to redeem from a mortgage must be paid either to the party holding the mortgage or to the officer provided by the statute. In many of the states the law officer to whom the money is to be paid is made by the statute the sheriff in whose hands the execution is placed or by whom the same was made;<sup>6</sup> and such sheriff, in receiving the money for redemption, acts as an officer of the law and not as agent of the party who

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<sup>1</sup> *Saunders v. Frost*, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394.

<sup>2</sup> *Id.*

<sup>3</sup> *Saunders v. Frost*, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394; *Mann v. Richardson*, 38 Mass. (21 Pick.) 355, 359.

<sup>4</sup> *Lamson v. Sutherland*, 18 Vt. 399.

<sup>5</sup> *Fogal v. Piro*, 17 Abb. (N. Y.) Pr. 113.

<sup>6</sup> Under the New York statute,

1837, c. 150, § 33,—requiring one who has given a mortgage to the loan commissioners of the U. S. Deposit Fund to pay the principal and interest to the first Tuesday of October—he cannot redeem without strict compliance with the terms of the statute. He has no right to an accounting for the rents and profits. *Thompson v. Otsego County Comm'rs*, 16 Hun (N. Y.) 86.

purchased at the sale,<sup>1</sup> notwithstanding the general rule that a sheriff becomes the agent of the plaintiff to receive payment of judgment when an operative execution comes into his hands, and his authority in the premises continues while the writ remains in force.<sup>2</sup> Where an officer is provided to receive the funds on redemption, to effect that purpose payment must be made to the officer designated. Thus it has been said that under the system of the United States Courts, payment of money into the hands of the sheriff is not a redemption of the premises sold under a decree of foreclosure passed by that court, when the United States court has, by its rules, provided that the redemption money shall be paid to its clerk.<sup>3</sup>

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<sup>1</sup> *Horton v. Moffitt*, 14 Minn. 289; s. c. 100 Am. Dec. 222.

<sup>2</sup> *Harris v. Ellis*, 30 Tex. 4; s. c. 94 Am. Dec. 296.

<sup>3</sup> *Connecticut Mutual Life Ins. Co. v. Crawford*, 21 Fed. Rep. 231. In this case the court say: "In July, 1878, long prior to the proceedings in question, this court adopted certain rules for regulating the redemption from sales in this court, in cases where redemption is allowed by the statute of the State of Illinois. These rules were adopted in accordance with the suggestion made by the supreme court of the United States, in *Brine v. Ins. Co.*, 96 U. S. 627, and they have since been confirmed in the case of the *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 56; s. c. 2 Sup. Ct. 236; and the court there holds, in substance, that it is not only within the power, but it is the duty, of the federal court, when rights are given by a state statute, to adjust the practice of the court by its rules, so as to secure and protect the property rights given by the statute. In the same case it is also held that the rules adopted by this court were

within the scope and power of the court, and such it was not only the right but the duty of the court to adopt. This court, by the rules of 1878, provided that redemption should be made by a judgment creditor from a sale under a judgment or decree of this court, by the creditor suing out his execution in the ordinary manner on his judgment, placing his execution in the hands of the proper officer to execute, and paying the money needed to redeem into the hands of the clerk of this court, together with the commissions of the clerk for receiving and paying out the money. The redeeming creditor in this case ignored these rules, and undertook to make a redemption by paying his money to an officer not known to this court, and not within its control, and with whom the court had no relations whatever, and with whom, it seems to me, it is not in the power of the redeeming or judgment creditor to bring the complainant or this court into relations. The complainant, being a non-resident corporation, had a right to seek this forum as the one through which it would enforce its lien on these lots,

§ 1036. **Tender on redemption.**—A tender of the amount due on the mortgage is generally regarded as an essential to redemption,<sup>1</sup> and the party seeking to redeem must offer to pay the whole mortgage debt due, and not merely the sum for which the land sold, where it brought less than the full amount of the mortgage debt, together with interests and costs.<sup>2</sup> The rule that the lien of the mortgage cannot be discharged either in whole or in part by a tender of less than the whole amount due thereon, is not effected by the fact that only a portion of the amount due belongs to the holder of the mortgage, and the balance thereof to some other person, for where such holder acts as trustee,<sup>3</sup> where a junior lienor or other person in interest seeks to redeem from a prior mortgagee, he must make a tender in such unmistakable terms that there can be no doubt of the intention to satisfy and discharge the senior mortgage, not to redeem for a transfer of it.<sup>4</sup> And where it is the design of the parties to redeem but a portion of the property sold on the foreclosure of a senior mortgage,

and was not obliged to look to any state court or its officers for the purpose of obtaining the money, after this court had made the rules of procedure."

<sup>1</sup> *Horn v. Indianapolis National Bank*, 125 Ind. 381; s. c. 25 N. E. Rep. 558; 9 L. R. A. 676. See: *Dayton v. Dayton*, 68 Mich. 437; s. c. 36 N. W. Rep. 209; 13 West. Rep. 69; *Still v. Buzzell*, 60 Vt. 478; s. c. 12 Atl. Rep. 209; 5 N. Eng. Rep. 644; *Kopper v. Dyer*, 59 Vt. 477; s. c. 9 Atl. Rep. 4; 4 N. Eng. Rep. 368.

<sup>2</sup> *Wood v. Holland*, 53 Ark. 69; s. c. 13 S. W. Rep. 739; *Horn v. Indianapolis National Bank*, 125 Ind. 381; s. c. 25 N. E. Rep. 558; 9 L. R. A. 676; *Shannon v. Hay*, 106 Ind. 589; s. c. 7 N. E. Rep. 376; 4 West. Rep. 718; *Rodriguez v. Hayes*, 76 Tex. 225; s. c. 13 S. W. Rep. 296.

In Indiana where a mortgagor seeks to have his title quieted against the purchaser at foreclosure sale, he must show that he has paid or tendered to the purchaser the amount paid by him in satisfaction of the mortgage debt, before he can avail himself of any illegality in the sale. *Shannon v. Hay*, 106 Ind. 589; s. c. 7 N. E. Rep. 376; 4 West. Rep. 718.

<sup>3</sup> *Graham v. Lanham*, 50 N. Y. 457.

<sup>4</sup> *Ferguson v. Wagner*, 41 Ind. 450; *Benton v. Hatch*, 122 N. Y. 329; s. c. 25 N. E. Rep. 486; *Clark v. Mackin*, 95 N. Y. 345, 351; *Twombly v. Cassidy*, 82 N. Y. 155; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; *Cole v. Malcolm*, 66 N. Y. 363.

Thus in a case where a party borrowed a \$1,000 upon a note, and also offered a mortgage to secure the note, and on the appointed day for redemp-



there must be a tender of the entire amount of the senior mortgage debt.<sup>1</sup>

The supreme court of Texas, in the case of *Rodriguez v. Hayes*,<sup>2</sup> say that where a mortgagee is placed in possession under the mortgage and entitled to retain it, the mortgagor cannot recover possession after condition broken, without discharging the debt, although the latter is barred by limitation.

There are circumstances under which a tender of the amount due on a mortgage need not be made by a person seeking to redeem. Thus it has been said that a tender of the amount due a senior lienholder in possession of his debtor's property under a judicial sale is excused in favor of a junior lienholder seeking to redeem the property, where the former has money in his hands exceeding the amount of his claim, which he is equitably bound to apply in discharge thereof.<sup>3</sup> In some of the states a tender is not necessary in redemption proceedings. Thus the supreme court of Missouri, in the case of *Kline v. Vogel*,<sup>4</sup> say it is unnecessary for the mortgagor to make a tender before seeking to compel redemption; all that is necessary is that he pay the sum found by the court to be due, within the time limited by the decree.<sup>5</sup>

§ 1037. Usurious and compound interest.—The person seeking to redeem from a mortgage is not required to

tion took the money and said in effect to the mortgagee, "I will pay you this money if you will first transfer the mortgage and the note to a third person; the court held that such an offer was not a tender, but a mere overture, a proposition which the mortgagee might accept or not, as he saw fit, and that his foreclosure was valid. *Ferguson v. Wagner*, 41 Ind. 450.

<sup>1</sup> See: *Smith v. Shay*, 62 Iowa 119; s. c. 17 N. W. Rep. 444; *Knowles v. Rablin*, 20 Iowa 101; *Street v. Beal*, 16 Iowa 68; s. c. 85 Am. Dec.

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504; *White v. Hampton*, 13 Iowa 259; *Heimstreet v. Winne*, 10 Iowa 430.

<sup>2</sup> 76 Tex. 225; s. c. 13 S. W. Rep. 296.

<sup>3</sup> *Horn v. Indianapolis Nat. Bk.*, 125 Ind. 381; s. c. 25 N. E. Rep. 558; 9 L. R. A. 676.

<sup>4</sup> 90 Mo. 239; s. c. 2 S. W. Rep. 408; 6 West. Rep. 649.

<sup>5</sup> See: *Owen v. Blake*, 44 Ill. 135; *Barnard v. Cushman*, 35 Ill. 481; *Reeves v. Cooper*, 12 N. J. Eq. (1 Beas.) 223; *Parsons v. Parsons*, 9 N. H. 336.

pay usurious or compound interest, although the note secured by the mortgage may in terms require it.<sup>1</sup> Thus in a case where the original mortgagor, in a mortgage given to secure a note with interest payable annually, gave a second note for the interest computed annually, the court said the mortgagor might redeem upon payment of the original note and simple interest.<sup>2</sup> In those cases where usurious interest is reserved, that fact may be pleaded in the bill to redeem and the party will be entitled to have an allowance made him of the statutory penalty for unpaid interest, and a deduction thereof from the sum payable to mortgagee to redeem; but he will not be entitled to an allowance for usurious interest paid by a former owner of the equity.<sup>3</sup>

§ 1038. Redeeming whole of mortgaged land.—We have already seen that where a person seeks to redeem from a mortgage, he must pay the full amount of the debt and comply with the covenants and conditions in the instrument.<sup>4</sup> This applies equally to persons holding the entire equity, and to those who hold only an undivided portion of a lot or tract of land.<sup>5</sup> On payment of the whole debt the party redeeming is subrogated to the interest of the holder of the mortgage,<sup>6</sup> and cannot compel contribution from all others interested in the mortgaged land.<sup>7</sup>

It is said that, in order to be able to redeem from a mort-

<sup>1</sup> *Parkhurst v. Cummings*, 56 Me. 155.

<sup>2</sup> *Id.*

<sup>3</sup> See: *Adams v. McKenzie*, 18 Ala. 698; *Gerrish v. Black*, 104 Mass. 400; *Smith v. Robinson*, 92 Mass. (10 Allen) 130; *Minot v. Sawyer*, 90 Mass. (8 Allen) 78; *Drury v. Morse*, 85 Mass. (3 Allen) 445; *Hart v. Goldsmith*, 83 Mass. (1 Allen) 145; *Butterfield v. Kidder*, 25 Mass. 8 (Pick.) 512; *Kirkpatrick v. Smith*, 55 Mo. 389; *Perrine v. Poulson*, 53 Mo. 309; *Fanning v. Dunham*, 5 John. Ch. (N. Y.) 122, 145; *Eagleson v. Shotwell*, 1 John. Ch. (N. Y.) 536;

*Rufus v. Rathburn*, 1 John. Ch. (N. Y.) 367; *Henkle v. Royal Exch. Asso. Co.*, 1 Vern. 320.

<sup>4</sup> See: *Ante*, § 884, *et seq.*

<sup>5</sup> *Buettel v. Harmount*, 46 Minn. 481; s. c. 49 N. W. Rep. 250. See: *Calkins v. Mansel*, 2 Root (Conn.) 333; *Johnson v. Handage*, 31 Me. 28; *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 152; *Taylor v. Bassett*, 3 N. H. 290; *Palk v. Clinton*, 12 Ves. 59; s. c. 8 Rev. Rep. 283.

<sup>6</sup> See: *Ante*, § 962.

<sup>7</sup> See: *Post*, § 1067 *et seq.*

gage on the property of a railroad company, lying in different states, the entire mortgage must be redeemed, for the reason that the mortgagee has a lien upon every part of the railroad to secure every part of his mortgage debt.<sup>1</sup>

§ 1039. **Redeeming but part of mortgaged land.**—We have already seen that the general rule is that a person seeking to redeem, either before<sup>2</sup> or after<sup>3</sup> maturity, or after foreclosure,<sup>4</sup> must pay the full amount of the mortgage debt,<sup>5</sup> and redeem the whole of the mortgaged land;<sup>6</sup> but to this general rule there are certain well-defined exceptions that exist under special circumstances, which would make the enforcement of the rule inequitable. Thus, where the mortgage has been foreclosed and the land purchased by the holder of the mortgage, without making all the persons interested parties to the suit,<sup>7</sup> the owner of a portion of the mortgaged premises not made a party is entitled to redeem his portion of the mortgaged premises on paying the proportionate amount of the mortgage debt his portion of the land should bear.<sup>8</sup> The reason for this exception is that the holder of the mortgage, by such a foreclosure, sale and purchase, voluntarily severs his right to receive the whole of the mortgage debt,<sup>9</sup> and to have the whole of the mortgaged premises redeemed,<sup>10</sup> obtaining an indefeasible title to such part of the mortgaged premises as the owners there were duly made parties to the proceedings, and a defeasible title as to that portion the owners of which were not made parties.<sup>11</sup>

Another exception to the general rule, is in those cases where one takes a deed of warranty to a portion of a mortgaged tract of land, and the remaining portion of the land is sufficient to satisfy the mortgage debt in full. Under

<sup>1</sup> Wood v. Goodwin, 49 Me. 260; s. c. 77 Am. Dec. 259.

<sup>2</sup> See: *Ante*, § 996.

<sup>3</sup> See: *Ante*, § 997.

<sup>4</sup> See: *Ante*, §§ 999, 1032.

<sup>5</sup> See: *Ante*, § 1030.

<sup>6</sup> See: *Ante*, § 1038.

<sup>7</sup> As to rights of interested persons not made parties to an action to foreclose. See: *Ante*, § 916.

<sup>8</sup> Green v. Dixon, 9 Wis. 532.

<sup>9</sup> See: *Ante*, § 1030.

<sup>10</sup> See: *Ante*, § 1038.

<sup>11</sup> See: Jones on Mortg. (4th ed.) § 1074.

these circumstances, the purchaser of such portion may maintain a bill in equity to redeem the portion purchased against a subsequent assignee of the mortgage, without contribution,<sup>1</sup> although such assignee may have become the owner of the equity of redemption of the remaining portion of the land.<sup>2</sup>

Another exception to the general rule, evidently based upon grounds of public policy, is the right of a railroad company, which has taken for its uses land upon which there is a mortgage or other prior lien, to redeem from such mortgage or prior lien the lands appropriated to its use upon paying a ratable proportion of the mortgage debt,<sup>3</sup> which it must do to the full value of the property, if need be, irrespective of improvements put thereon by the railroad company.<sup>4</sup>

§ 1040. **Requiring reconveyance of other titles.**—On a redemption a mortgagor, or those claiming under him, cannot require the reconveyance of more than passed by the mortgage deed. Such redemptioner certainly cannot obtain or require in such a reconveyance any adverse or superior title subsequently and in good faith acquired by the mortgagee or his assignee, and the reconveyance from the mortgagee or his assignee should, therefore, be limited to the interest conveyed by the mortgage deed.<sup>5</sup> In the case of *Roberts v. Fleming*,<sup>6</sup> a mortgagee, under a power in the mortgage, sold the premises and improperly himself became the purchaser indirectly. Subsequently, and while in pos-

<sup>1</sup> See: *Post*, c. XLIV.

<sup>2</sup> *Bradley v. George*, 84 Mass. (2 Allen) 392. See: *Dooley v. Potter*, 140 Mass. 49, 59; *Beard v. Fitzgerald*, 105 Mass. 134; *George v. Wood*, 93 Mass. (11 Allen) 43; s. c. 91 Mass. (9 Allen) 80, 82; *Kilburn v. Robbins*, 90 Mass. (3 Allen) 466, 470; *Welch v. Beers*, 90 Mass. (8 Allen) 151, 152; *George v. Kent* 89 Mass. (7 Allen) 16; *Chare v. Woodbury*, 60 Mass. (6 Cush.) 143; *Parkham v. Welch*, 30 Mass. (19 Pick.) 231; *Hedge v.*

*Holmes*, 27 Mass. (10 Pick.) 380; *Amory v. Fairbanks*, 3 Mass. 562; *Newall v. Wright*, 3 Mass. 138, 150.

<sup>3</sup> *Daws v. Congdon*, 16 How. (N.Y.) Pr. 571; See: *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. (1 Stew.) 593.

<sup>4</sup> *Dows v. Congdon*, 16 How. (N. Y.) Pr. 571; *Aspinwall v. Chicago & N. W. R. Co.*, 41 Wis. 474.

<sup>5</sup> *Hall v. Arnott*, 80 Cal. 348; s. c. 22 Pac. Rep. 200.

<sup>6</sup> 53 Ill. 196.

session under his purchase, he acquired an outstanding title to a portion of the mortgaged premises, which had been sold under a prior judgment lien. On bill brought to redeem it was held that he should be allowed the amount of his mortgage debt and interest, all taxes paid upon the land, and all reasonable repairs, as well as necessary and permanent improvements, made prior to filing the bill to redeem; but that he should not be allowed the amount he paid for outstanding title, or be charged with rents and profits<sup>1</sup> received, or which might have been received by reasonable effort and proper management of the property.<sup>2</sup>

§ 1041 Repairs—Allowance for on redemption.—The cost of repairs necessarily made and improvements,<sup>3</sup> reasonable in their character, and beneficial to the estate, made in good faith, should be allowed for on redemption. Thus it has been said by the supreme court of Missouri, in the case of *Stevenson v. Edwards*,<sup>4</sup> that persons who have a remainder under a deed which has been declared void as to creditors and purchasers, but valid as between the parties thereto, may bring suit to redeem the land from the lien of deeds of trust executed by the life tenant, though the land has been sold thereunder, but must allow the purchaser under such sale the cost of all necessary expenses and repairs.

§ 1042. Rents and profits—Accounting for.—A purchaser at a foreclosure sale is not usually required to account for rents and profits, especially where such purchaser is other than the mortgagee,<sup>5</sup> except in those cases where the

<sup>1</sup> *Roberts v. Fleming*, 53 Ill. 196.

As to rents and profits, see full discussion, *Post*, § 1042.

<sup>2</sup> *Roberts v. Fleming*, 53 Ill. 196.

<sup>3</sup> See: *Post*, § 1048.

<sup>4</sup> 98 Mo. 622; s. c. 12 S. W. Rep. 255.

<sup>5</sup> See: *Roberts v. Fleming*, 53 Ill. 196; *Gaskell v. Viquesney*, 122 Ind. 244; s. c. 23 N. E. Rep. 791; *Harri-son v. Edwards*, 98 Mo. 622; s. c. 12

S. W. Rep. 255; *Higinbotham v. Benson*, 24 Neb. 461; s. c. 39 N. W. Rep. 418; 8 Am. St. Rep. 211; *Renard v. Brown*, 7 Neb. 449.

In the case of *Roberts v. Fleming*, 53 Ill. 196, a mortgagee, under a power in the mortgage, sold the premises, but improperly became the purchaser himself, indirectly. Subsequently, and while in possession, he purchased in the outstanding title to



possession was not only wrongfully taken by the mortgagee, but accompanied by force and fraud, in which case the mortgagee, on a suit to redeem, cannot be charged with less than the whole rental value during his possession;<sup>1</sup> and it has even been said that a mortgagee who purchases the premises on a foreclosure sale, and takes possession in the capacity of owner, is not liable to account for rents and profits on a redemption.<sup>2</sup> But it has been said that a junior incumbrancer on redemption can compel a senior mortgagee who has been in possession, to account for rents and profits, in the same manner that the mortgagor could do so.<sup>3</sup> And it is held that in a suit by a remainderman to redeem lands mortgaged by the life tenant, the mortgagee must account for all rents received by him; and it is no defense that he has paid a part of them to the life tenant.<sup>4</sup>

§ 1043. *Payment of costs of suit.*—The question of costs on a bill brought to redeem has already been partially discussed,<sup>5</sup> and will hereafter<sup>6</sup> receive fuller consideration. It is a universal rule that a mortgagor who waits until after the advertisement of the property for sale before filing his bill to redeem, although notified several months before that the property was advertised for sale under a power in the

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a portion of the mortgaged premises, which had been sold under a prior judgment lien. The mortgage bore date July 30, 1858, and his sale was made December, 1860. In January, 1865, a bill was filed to redeem. The court held that redemption should be allowed on these terms: The mortgagee to be allowed the amount of his mortgage debt, and interest, all taxes paid upon the lands, and all reasonable repairs, and, on account of the delay in filing the bill to redeem, for necessary and permanent improvements, made prior to the filing of the bill. He should be charged with the amount bid at the mortgage sale upon that portion of the lands to which he acquired the outstanding title, but not

with the rents and profits thereof, nor should he be allowed the amount paid for the outstanding title. Upon the residue of the mortgaged premises, he should be charged with the rents and profits received, or which might have been received by reasonable effort and proper management of the property.

<sup>1</sup> *Meigs v. McFarlan*, 72 Mich. 194; s. c. 40 N. W. Rep. 246.

<sup>2</sup> *Gaskell v. Viquesney*, 122 Ind. 244; s. c. 23 N. E. Rep. 791.

<sup>3</sup> *Gaskell v. Viquesney*, 122 Ind. 244; s. c. 23 N. E. Rep. 791.

<sup>4</sup> *Stevenson v. Edwards*, 98 Mo. 622; s. c. 12 S. W. Rep. 255.

<sup>5</sup> See: *Ante*, § 1020.

<sup>6</sup> See: *Post*, § 1102.

mortgage, will be required to pay the costs of advertising.<sup>1</sup> And a junior mortgagee redeeming from a foreclosure by a senior mortgagee, will usually be requested to pay the costs of foreclosure and sale,<sup>2</sup> except in those cases where he has not been made a party to the action to foreclose the senior mortgage.<sup>3</sup>

§ 1044. **Taxes and assessments and disbursements.**—The universal rule is that mortgaged property, notwithstanding the mortgage, is liable for the taxes and assessments duly and regularly assessed and levied. Consequently where a party, by way of cross-bill or otherwise, seeks to redeem the whole or a portion of the pledged premises, he will be required to pay the whole or a proportionate amount of the valid taxes and assessments which have been paid to protect the property and the lien thereon, notwithstanding the mortgage does not especially so provide.<sup>4</sup> But whether the money paid to redeem the mortgaged premises from a tax sale becomes a part of the mortgage debt and chargeable to the redemption, there is a lack of harmony in the authorities. There is a strong line of decisions holding that the money so paid by the mortgagee or purchaser at foreclosure sale, becomes a part of the

<sup>1</sup> Means v. Anderson, 19 R. I. (1895); s. c. 32 Atl. Rep. 82.

<sup>2</sup> Stanbrough v. Daniels, 77 Iowa 561; s. c. 42 N. W. Rep. 443.

<sup>3</sup> Gaskell v. Viquesney, 122 Ind. 214; s. c. 23 N. E. Rep. 791; Page v. Brewster, 31 N. Y. 218. See: *Ante*, § 620.

<sup>4</sup> Saunders v. Peck, 131 Ill. 407; s. c. 25 N. E. Rep. 508, revis'g 30 Ill. App. 238; Miner v. Beekman, 50 N. Y. 337. See: Broquet v. Sterling, 56 Iowa 357; s. c. 9 N. W. Rep. 301; Strong v. Burdick, 52 Iowa 630; s. c. 3 N. W. Rep. 707; Williams v. Hilton, 35 Me. 547; s. c. 58 Am. Dec. 729; Walton v. Hollywood, 47 Mich. 385; s. c. 11 N. W. Rep. 209; Nopson v. Horton, 20 Minn. 268; Manning v. Tuthill, 30 N. J. Eq. (5 Stew.) 29;

Sidenberg v. Ely, 90 N. Y. 257; s. c. 43 Am. Rep. 163; Robinson v. Ryan, 25 N. Y. 320, 327; Madison Ave. Church v. Oliver St. Church, 41 N. Y. Supr. Ct. 383; Fleishauer v. Doellner, 9 Abb. (N. Y.) N. C. 372; Kortright v. Cady, 23 Barb. (N. Y.) 490; Dale v. McEvers, 2 Cow. (N. Y.) 118; Eagle F. Ins. Co. v. Pell, 2 Edw. Ch. (N. Y.) 631; Rapelye v. Prince, 4 Hill (N. Y.) 119; s. c. 40 Am. Dec. 267; Fauer v. Winans, 1 Hopk. Ch. (N. Y.) 283; s. c. 14 Am. Dec. 545; Brevoort v. Randolph, 7 How. (N. Y.) Pr. 398; Weed v. Hornby, 35 Hun (N. Y.) 582; Silver Lake Bank v. North, 4 John. Ch. (N. Y.) 370; Burr v. Veeder, 3 Wend. (N. Y.) 412; Goldbeck's Appeal, (Pa. 1887), 8 Atl. Rep. 29.

mortgage debt in equity,<sup>1</sup> especially where the tax title is bought up to protect the lien before the sale under foreclosure,<sup>2</sup> on the theory that if the tax title fails the mortgagee or holder of the mortgage may enforce the tax liens by proceedings to foreclose the same.<sup>3</sup> On the other hand, Mr. Jones, in his work on mortgages,<sup>4</sup> says that a statutory provision to the effect that the amount of money paid in discharge of valid taxes and assessments on the mortgaged lands by the mortgagee shall constitute a lien and be collectible with the mortgage debt, does not entitle the mortgagee to add to the mortgage debt in this way the amount paid by him in purchasing at a tax sale, alleging that such a purchase is not a payment of taxes, but a purchase of a new lien upon the estate independent of his mortgage. The reason for such a rule is a little difficult to ferret out. The learned author cites but one case, that of *Williams v. Townsend*,<sup>5</sup> but it is thought this case is not authority for such a rule. All that the court decide in that case is that where a mortgagee has a right, in default of the mortgagor, to pay taxes and assessments and collect them as part of the mortgage debt, he cannot, by bidding in the premises at a tax sale, and taking a certificate therefor, deprive the mortgagor of the right given by statute to redeem the sale for taxes. The application since made of that decision by

<sup>1</sup> See: *Mix v. Hotchkiss* 14 Conn. 32; *Williams v. Hilton*, 35 Me. 457; s. c. 58 Am. Dec. 734; *Skilton v. Roberts*, 129 Mass. 306; *Davis v. Bean*, 114 Mass. 360; *Schoenheit v. Nelson*, 16 Neb. 235; s. c. 2 N. W. Rep. 205; *Brown v. Simons*, 44 N. H. 475; *Sidenberg v. Ely*, 90 N. Y. 257, 262; *Marshall v. Davis*, 78 N. Y. 414; *Williams v. Townsend*, 31 N. Y. 414; *Robinson v. Ryan*, 25 N. Y. 320; *Eagle F. Ins. Co. v. Pell*, 2 Edw. Ch. 631; *Fauer v. Winans*, 1 Hopk. Ch. (N. Y.) 283; s. c. 14 Am. Dec. 545; *Brevoort v. Randolph*, 7 How. (N. Y.) Pr. 388; *Burr v. Veeder*, 3 Wend. (N. Y.) 412.

<sup>2</sup> *Skilton v. Roberts*, 129 Mass. 306. 309.

<sup>3</sup> *Schoenheit v. Nelson*, 16 Neb. 235; s. c. 20 N. W. Rep. 205. See: *Zahradnicek v. Selby*, 15 Neb. 579; s. c. 19 N. W. Rep. 645; *Reed v. Merriam*, 15 Neb. 323; s. c. 18 N. W. Rep. 137; *Towle v. Holt* 14 Neb. 222; s. c. 15 N. W. Rep. 203; *Miller v. Hurford*, 13 Neb. 14; s. c. 12 N. W. Rep. 832; *Wilhelm v. Russell*, 8 Neb. 120; *Pettit v. Black*, 8 Neb. 52; *Peet v. O'Brien*, 5 Neb. 360.

<sup>4</sup> 2 Jones on Mortg. (4th ed.), § 1080.

<sup>5</sup> 31 N. Y. 411.

the New York court of appeals shows unmistakably that they do not regard it as announcing the doctrine attributed to it.<sup>7</sup>

<sup>1</sup> *Williams v. Townsend* has been referred to, cited or distinguished six times by the court of appeals of New York, four times on question of taxes and twice on questions of incumbrances.

In the case of *Oliphant v. Burns*, 146 N. Y. 218, 241, it is distinguished and declared to be inapplicable.

In the case of *People ex rel Oakley v. Blackmann*, 126 N. Y. 310, 317, it is cited by Judge Gray in the following discussion, "This court in the case of *In re Clementi v. Jackson*, 92 N. Y. 591, and recently in the second division, in the case of *McFarlane v. City of Brooklyn*, 122 N. Y. 589, has regarded a sale for unpaid taxes as a mode of enforcement of the city lien for taxes. In the case of *Williams v. Townsend*, 31 N. Y. 411, and *In re Clementi v. Jackson*, 92 N. Y. 591, the expressions in the opinions are unmistakable as to the effect of the sale upon the assessment lien upon property. In the former case Judge Davis holds that it is "merely an assignment of the lien of the tax, \* \* \* and that lien continues till the owner makes the redemption, or the holder of the certificate takes title to the property in the form prescribed. It is therefore, clear that the tax or assessment is not discharged by that sale and certificate. *In re Clementi v. Jackson*, Judge Rapallo held that the payments made by the purchaser at a tax sale were not payments of the taxes. He said: 'The payments made by him were no more a payment of the taxes than would a payment he made by an assignee to an assignor of a bond, in consideration of the assign-

ment thereof, be a payment of the bond.'"

In the case of *Sidenberg v. Ely*, 90 N. Y. 257, 263, Judge Miller lays down the rule that "taxes paid may be added to the mortgage debt," and says, "numerous cases in the reports sustain this doctrine," citing *Eagle F. Ins. Co. v. Bell*, 2 Edw. Ch. (N. Y.) 621; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Brevoort v. Randolph*, 7 How. (N. Y.) Pr. 398; *Fauer v. Winons*, 1 Hopk. Ch. (N. Y.) 283; *Marshall v. Davies*, 78 N. Y. 414; *Robinson v. Ryan*, 25 N. Y. 320; and *Williams v. Townsend*, 31 N. Y. 411, 414, and adds: "These cases are cited by counsel for the appellant, and it is claimed they do not sustain the doctrine contended for. While all of them do not entirely cover, yet they tend to the support of the principle, that a mortgagee, who to save his mortgage and protect his security, is under the necessity of paying the taxes and assessments to prevent the property from being sold, should be allowed for the same as a part of his mortgage debt upon the foreclosure of his mortgage."

In *Cornell v. Woodruff*, 77 N. Y. 203, 206; *Williams v. Townsend* is cited as authority by Judge Rapallo in the following language: "These certificates of sales for taxes were liens upon the premises to the amount of the taxes, expenses of sale and interest at the rate allowed by law, on such sales. Until the time for redemption expired and a lease should be executed the lien continued."

In *Ten Eyck v. Craig*, 62 N. Y. 406, 421, Judge Andrews cites

The American and English Encyclopædia of Law<sup>1</sup> endorses the position of Mr. Jones by copying, without quotation marks, his exact language, but cites in addition to *Williams v. Townsend*, *Vincent v. Moore*,<sup>2</sup> and *Brown v. Simmons*,<sup>3</sup> neither of which support the proposition, and one, *Brown v. Simmons*, is an authority on the other side. In the case of *Vincent v. Moore*,<sup>4</sup> the supreme court of Michigan say that a mortgagee who, to protect his mortgage, redeems the mortgaged land from tax sale, and subsequently forecloses his mortgage under the power of sale, making no claim for the amount paid for taxes, and buys in the land for the amount of the mortgage debt, and the mortgagor redeems from such sale, the mortgagee cannot afterwards, by suit in equity, enforce a claim for the amount paid to redeem from the tax sale. It is plainly distinguishable from and not an authority for the doctrine to which cited. In the case of *Brown v. Simmons*,<sup>5</sup> it is said that a mortgagee in possession, taking rents and profits, can acquire no title as against the mortgagor or his assignee, by a purchase of the land at a collector's sale for the taxes upon it; but he may add the sum paid for such taxes to the mortgage debt as expenses necessarily incurred in protecting the estate.<sup>6</sup>

*Williams v. Townsend* as authority to the proposition that "he (the mortgagee) may buy in any outstanding title and hold it against the mortgagor," citing *Cameron v. Irwin*, 5 Hill (N. Y.) 280; *Williams v. Townsend*, 31 N. Y. 411, 415; *Shaw v. Bonny*, 13 Week R. 374; s. c. 2 D. G. J. & S. 468.

In *Lewis v. Duane*, 141 N. Y. 302, 313, *Williams v. Townsend* is cited to a point in relation to trusts.

<sup>1</sup> 20 Am. & Eng. Ency. of L. (1st ed.) 621.

<sup>2</sup> 51 Mich. 618; s. c. 17 N. W. Rep. 618.

<sup>3</sup> 44 N. H. 475.

<sup>4</sup> 51 Mich. 618; s. c. 17 N. W. Rep. 618.

<sup>5</sup> 44 N. H. 475.

<sup>6</sup> In this case it appears that on December 28, 1858, one Thayer entered into possession of the land under process, for the purpose of foreclosing the mortgage; on January 15, 1859, the collector of taxes sold a part of the mortgaged premises, including the land in litigation, to Thayer for the taxes of 1858, and not having been redeemed within the year, Thayer conveyed the same to Simons, to whom he had previously assigned the mortgage; so that at the time of the sale and payment of the money for the taxes, Thayer was himself the holder of the mortgage, and in possession under it, although the taxes were assessed in April previous, and conse-



Where a mortgagee has paid prior charges and incumbrances on the land to protect his title<sup>1</sup> on redemption by the mortgagor or any one claiming under him, the mortgagee will be entitled to receive this as a part of the mortgage debt;<sup>2</sup> but it is otherwise as to debts paid by the mortgagee, which are not charges upon the land and necessary to protect the lien of the mortgage.<sup>3</sup>

§ 1045. **Surrender of premises under statute.**—Under the statutes in some of the states,<sup>4</sup> it is a condition precedent to the right to redeem lands sold under mortgage foreclosure, that the possession of the land be delivered to the purchaser within a specified time from the date of the sale. The necessity to allege or prove a previous tender or surrender of the premises within the designated time arises where the statutory right existing after foreclosure is asserted, but not where the effort is to effectuate the equity of redemption.<sup>5</sup> Under such a statute, it has been held that redemption cannot be made by a householder who left

quently before Thayer's entry. The court say: "The payment, then, was necessary to protect the estate, and the amount paid might unquestionably have been added to the mortgage debt, as expenses necessarily incurred by the mortgagee to protect the estate." Citing: *Mix v. Hotchkiss*, 14 Conn. 32; *Williams v. Hilton*, 35 Me. 354; *Page v. Foster*, 7 N. H. 392; *Kortright v. Cady*, 23 Barb. (N. Y.) 497; *Godfrey v. Watson*, 3 Atk. 518.

<sup>1</sup> See: *Post*, § 1063.

<sup>2</sup> See: *Griggs v. Banks*, 59 Ala. 313; *Harper v. Ely*, 70 Ill. 581; *Hosford v. Johnson*, 74 Ind. 479; *Grant v. Parsons*, 67 Iowa 31; s. c. 24 N. W. Rep. 578; *Arnold v. Foot*, 7 B. Mon. (Ky.) 66; *McSorley v. Larissa*, 100 Mass. 270; *Davis v. Wynn*, 84 Mass. (2 Allen) 111; *Daton v. Daton*, 68 Mich. 437; s. c. 36 N. W. Rep. 209; *Harrigan v. Welmuth*, 77 Mo. 542; *Johnson v. Payne*, 11 Neb. 269;

s. c. 9 N. W. Rep. 81; *Weld v. Sabin*, 20 N. H. 533; s. c. 51 Am. Dec. 240; *Jenness v. Robinson*, 10 N. H. 215; *Page v. Foster*, 7 N. H. 392; *Robinson v. Leavitt*, 7 N. H. 100; *Madison Ave. Baptist Church v. Oliver Street Baptist Church*, 73 N. Y. 95; *Robinson v. Ryan*, 25 N. Y. 320; *Silver Lake Bank v. North*, 4 John. Ch. (N. Y.) 370; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Harper's Appeal*, 64 Pa. St. 315; *Marson v. Robinson*, 31 Pa. St. 459; *Lyman v. Little*, 15 Vt. 576.

<sup>3</sup> See: *Burnett v. Denniston*, 5 John. Ch. (N. Y.) 35; *McKinstry v. Mervin*, cited in 3 John. Ch. (N. Y.) 466; *Palmer v. Fowley*, 71 Mass. (5 Gray) 545; *Green v. Tanner*, 49 Mass. (8 Met.) 411; *Cleveland v. Clark, Brayt.* (Vt.) 165.

<sup>4</sup> As Ala. Code, § 1880.

<sup>5</sup> *Pryor v. Hollinger*, 88 Ala. 405; s. c. 6 So. Rep. 760.

on the premises some of his effects and a part of his family, who maintained an attitude of resistance to the purchaser's entry, and were, after the lapse of ten days, with their property, removed under legal process.<sup>1</sup>

§ 1046. Allowance as attorney fees.—We have already seen<sup>2</sup> that payments of costs of suit is usually one of the conditions of redemption from a mortgage foreclosure; but redemption from a statutory foreclosure cannot be conditioned on the payment of an allowance, in the nature of attorney fees, beyond what is authorized by statute.<sup>3</sup> The exaction of such attorney fees, even where provided for in a power of sale, as a condition for redemption from a statutory foreclosure, is inconsistent with public policy, as are all stipulations for fees in advance, other than those allowed by statute.<sup>4</sup>

§ 1047. Notice of intention to redeem.—The statutes under which redemption may be made, in some of the states require that notice of the intention to redeem shall be given. Where the statutes thus provide they should be strictly complied with in order to save all the rights of the party. It is provided in England that a mortgagee under a mortgage assigning to him the fund in court, subject to a prior life interest and the proviso for redemption, is entitled, if six months' notice of intention to pay off the mortgage has not been given, to six months' interest after the date of service upon him of a petition by the trustee of a settlement of the fund made after the death of the life tenant, to

<sup>1</sup> *Nelms v. Kennon*, 88 Ala. 329; s. c. 6 So. Rep. 744.

<sup>2</sup> See: *Ante*, §1043.

<sup>3</sup> *Vosburgh v. Lay*, 45 Mich. 465; s. c. 8 N. W. Rep. 91. See: *Parks v. Allen*, 42 Mich. 482; s. c. 4 N. W. Rep. 227; *Myer v. Hart*, 40 Mich. 517; *Booth v. McQueen*, 1 Doug. (Mich.) 41.

<sup>4</sup> *Damon v. Deeves*, 62 Mich. 465; s. c. 29 N. W. Rep. 42. See: *Sinclair v. Larned*, 51 Mich. 339, 340;

s. c. 16 N. W. Rep. 672; *Millard v. Truax*, 50 Mich. 343; s. c. 15 N. W. Rep. 501; *Millard v. Truax*, 47 Mich. 251; s. c. 10 N. W. Rep. 358; *Louder v. Burch*, 47 Mich. 109; s. c. 10 N. W. Rep. 129; *Vosburgh v. Lay*, 45 Mich. 455; s. c. 8 N. W. Rep. 91; *Mayer v. Hart*, 40 Mich. 517; *Van Marter v. McMillan*, 39 Mich. 304; *Hardwick v. Bassett*, 29 Mich. 17; *Sage v. Riggs*, 12 Mich. 313.

have the fund applied in payment of the mortgage, and the residue to such persons entitled, where such mortgagee has not demanded or taken any steps to compel payment<sup>1</sup>.

§ 1048. **Payment for improvements.**—A purchaser in good faith of real estate on foreclosure of a prior mortgage who makes improvements on the property supposing his title to be good, is entitled to credit for the improvements thus made, less the rents and profits which he has enjoyed,<sup>2</sup> as against parties redeeming,<sup>3</sup> such as junior mortgagees, although they were not made parties to the action.<sup>4</sup> But improvements cannot be made by a mortgagee in possession at the expense of a redemptioner,<sup>5</sup> on the principle that he has no right to enhance the value of the estate and thus render it more difficult for the mortgagor, or those entitled to do so, to redeem.<sup>6</sup> But where a party is not a bonafide purchaser without notice of existing equities, he is not entitled to pay for improvements made without an express consent or approval,<sup>7</sup> on the principle that those who expend money or labor upon the property of another, knowing that they are doing wrong, are voluntary servants and agents and lose what they thus expend.<sup>8</sup> And a person who buys mort-

<sup>1</sup> *Smith v. Smith*, (1891) 3 Ch. 550.

<sup>2</sup> *Bradley v. Snyder*, 14 Ill. 263; s. c. 58 Am. Dec. 564.

<sup>3</sup> *Cable v. Ellis*, 120 Ill. 136; s. c. 11 N. E. Rep. 188; *Roberts v. Fleming*, 53 Ill. 193; *Bradley v. Snyder*, 14 Ill. 263; s. c. 58 Am. Dec. 564; *Troost v. Davis*, 31 Ind. 34; *Poole v. Johnson*, 62 Iowa 611; s. c. 17 N. W. Rep. 900; *Montgomery v. Chadwick*, 7 Iowa 114; *McSorley v. Larissa*, 100 Mass. 270; *Barnard v. Jennison*, 27 Mich. 230; *Higginbottom v. Benson*, 24 Neb. 461; s. c. 39 N. W. Rep. 418; *Vanderhaise v. Huges*, 13 N. J. Eq. (2 Beas.) 410; *Miner v. Beekman*, 50 N. Y. 337; *Mickle v. Dillay*, 17 N. Y. 80; *Fogal v. Pirro*, 10 Bosw. (N. Y.) 100; *Wetmore v. Roberts*, 10 How. (N. Y.) Pr. 51; *Putnam v. Ritchie*, 6

*Paige Ch. (N. Y.)* 390; *Benedict v. Gilman*, 4 *Paige Ch. (N. Y.)* 58; *Harder's Appeal*, 64 Pa. St. 315; *Green v. Westcott*, 13 Wis. 606; *Green v. Dixon*, 9 Wis. 532; *Fraser v. Prather*, 1 Mc A. (D. C.) 217.

<sup>4</sup> *Higginbottom v. Benson*, 24 Neb. 461; s. c. 39 N. W. Rep. 418.

<sup>5</sup> *Horn v. Indianapolis National Bank*, 125 Ind. 381; s. c. 25 N. E. Rep. 558; 9 L. R. A. 676.

<sup>6</sup> *Quinn v. Brittain*, 1 Hoff. Ch. (N. Y.) 353; *Moore v. Cable*, 1 John. Ch. (N. Y.) 385; *Bell v. New York*, 10 *Paige Ch. (N. Y.)* 49; *Holmes v. Grant*, 8 *Paige Ch. (N. Y.)* 252; *Putnam v. Ritchie*, 6 *Paige Ch. (N. Y.)* 390.

<sup>7</sup> *Witt v. Trustees*, 55 Wis. 380.

<sup>8</sup> *Silisbury v. McCoon*, 3 N. Y. 382.

gaged premises without actual knowledge of the existence of the mortgage, which is, however, recorded, and put bet-terments on the premises, will not be allowed therefor, except out of the surplus arising on foreclosure.<sup>1</sup> The reason for this is that the mortgage being recorded, is construc-tive notice to such purchaser.

§ 1049. **Right to assignment of mortgage.**—It has been said that the right to redeem a mortgage does not carry with it the right, upon such redemption, to an assign-ment of the mortgage and of the bond or other instrument evidencing the mortgage debt, or of either, unless the re-deeming party has the position of surety, or can be regarded as surety for the mortgage debt;<sup>2</sup> but if the party redeem-ing occupies the position of surety, on the payment of the debt, he is entitled to an assignment, or effectual transfer of, the debt and of the bond or instrument evidencing the debt.<sup>3</sup>

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<sup>1</sup> Whorton v. Moore, 84 N. C. 479; N. Y. 595; Hayes v. Ward, 4 John. s. c. 37 Am. Rep. 627. Ch. (N. Y.) 123; King v. Baldwin, 2

<sup>2</sup> Ellsworth v. Lockwood, 42 N. Y. John. Ch. (N. Y.) 554; Speiglemyer 89. v. Crawford, 6 Paige Ch. (N. Y.) 257;

<sup>3</sup> Ellsworth v. Lockwood, 42 N. Y. New York State Bank v. Fletcher, 5 89. Citing: Mathews v. Aiken, 1 Wend. (N. Y.) 85.

## CHAPTER XLIII.

### REDEMPTION—SUM PAYABLE ON.

§ 1050. Amount payable — Generally.	§ 1058. Same—By tenant in common.
1051. Same—By mortgagor.	1059. Same — From subsequent lienor and redemptioner.
1052. Same — Same — Where not made party.	1060. Consolidation of liens—Tacking.
1053. Same—Same—On redeeming from subsequent lienor-purchaser.	1061. Error in ascertaining amount.
1054. Same—By assignee of mortgagor.	1062. In case of usurious interest.
1055. Same—By third party interested.	1063. Sum paid to protect title.
1056. Same—By junior lienor.	1064. Permanent improvements—To be paid for when.
1057. Same — Same — Where not made party.	1065. Rents and profits—Applicable on sum payable when.
	1066. Costs on—Attorney's fees.

§ 1050. Amount payable — Generally.—The general rule is that any one seeking to redeem property after a foreclosure sale must pay or tender the full amount of the mortgage debt, regardless of what the property may have brought,<sup>1</sup> except in those cases where the deficiency has been paid by the person equitably bound to pay the same.<sup>2</sup>

<sup>1</sup> *Horn v. Indianapolis National Bank*, 125 Ind. 381; s. c. 25 N. E. Rep 558; 9 L. R. A. 676; *Duke v. Benson*, 79 Ind. 211; *Johnson v. Harman*, 19 Iowa 56; *Lee v. Stone*, 5 Gill & J. (Md.) 1; s. c. 23 Am. Dec. 589; *Way v. Mullett*, 143 Mass. 49; s. c. 8 N. E. Rep. 881; 3 N. Eng. Rep. 200; *Powers v. Golden Lumber Co.*, 43 Mich. 468; s. c. 5 N. W. Rep. 656; *Martin v. Fridley*, 23 Minn. 13; *Swearington v. Roberts*, 12 Neb. 333; s. c. 11 N. W. Rep. 325; *Raynor v. Selmes*, 52 N. Y. 579; *Collins v. Riggs*, 81 U. S. (14 Wall.) 49; bk 20 L. ed. 723.

<sup>2</sup> *Bradley v. Snyder*, 14 Ill. 263; s. c. 58 Am. Dec. 564; *Hosford v. Johnson*, 74 Ind. 479; *Knowles v. Rablin*, 20 Iowa 101; *Johnson v. Harman*, 19 Iowa 56; *Stoddard v. Forbes*, 13 Iowa 296. 300; *White v. Hampton*, 13 Iowa 259, 264; *Powers v. Golden Lumber Co.*, 43 Mich. 468; s. c. 5 N. W. Rep. 656; *Baker v. Powers*, 6 Mich. 522; *Martin v. Fridley*, 23 Minn. 13; *Gage v. Brewster*, 31 N. Y. 218; *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 526. 531; *Collins v. Riggs*, 81 U. S. (14 Wall.) 491; bk. 20 L. ed. 723.



In those cases where a law changing the rate of interest on bids at mortgage sales applies to all sales made thereafter, a purchaser at mortgage foreclosure will be entitled to receive the rate of interest prescribed by the law in force at the time when he purchased.<sup>1</sup>

§ 1051. Same—By mortgagor.—A mortgagor seeking to redeem must pay the whole amount due upon the mortgage, and will usually be allowed to redeem upon paying that amount, although indebted to the mortgagee on other accounts;<sup>2</sup> but where it appears to the court that the parties agreed that the mortgage should be held as security for a new and different debt from that set out, a court of equity will not aid the mortgagor, or permit him, to redeem until he does equity and pays the debt intended to be secured by the mortgage, according to the agreement and real equities between the parties.<sup>3</sup> On such redemption the mortgagor will not be required to account for the rents and profits during his occupation even where, after entry for breach of condition, he occupies the mortgaged premises under an agreement to pay a stipulated rent, which he neglects to do;<sup>4</sup> but will be chargeable with interest and with the taxes paid and necessary repairs made, together with costs of proper improvements,<sup>5</sup> but not with the costs

<sup>1</sup> Connecticut Mut. L. Ins. Co. v. Cushman, 103 U. S. 51; bk. 27 L. ed. 648.

<sup>2</sup> Stallings v. Thomas, 55 Ark. 326; s. c. 18 S. W. Rep. 184; Lee v. Stone, 5 Gill & J. (Md.) 1; s. c. 23 Am. Dec. 589; Taft v. Stoddard, 142 Mass. 545; s. c. 8 N. E. Rep. 586; 3 N. Eng. Rep. 103; Merritt v. Hosmer, 77 Mass. (11 Gray) 276; 71 Am. Dec. 713; Dickerson v. Hayes, 26 Minn. 100; 1 N. W. Rep. 834; Loney v. Courtney, 24 Neb. 580; s. c. 39 N. W. Rep. 616.

<sup>3</sup> Taft v. Stoddard, 142 Mass. 545; s. c. 8 N. E. Rep. 586; 3 N. Eng. Rep. 103; Upton v. National Bank of So. Reading, 120 Mass. 153; Stone

v. Lane, 92 Mass. (10 Allen) 74; Joslyn v. Wyman, 87 Mass. (5 Allen) 62.

<sup>4</sup> Harrison v. Wise, 24 Conn. 1; s. c. 63 Am. Dec. 151; Merritt v. Hosmer, 77 Mass. (11 Gray) 276; s. c. 71 Am. Dec. 713.

Mortgagors may be decreed to account for rents and profits of the mortgaged premises to the mortgagees, where by an appeal they have for a long time kept the mortgagees out of such rents and profits. Bank of Utica v. Finch, 3 Barb. Ch. (N. Y.) 293; s. c. 49 Am. Dec. 175.

<sup>5</sup> Stallings v. Thomas, 55 Ark. 326; s. c. 18 S. W. Rep. 184; Loney v. Courtney, 24 Neb. 580; s. c. 39 N.

of the sale where invalid, and will be entitled to credit for the reasonable rents and profits of the land.<sup>1</sup> In those cases where there has been a foreclosure for more than is actually due, the mortgagor may, in an action to redeem, be allowed to do so, on proper showing, by paying the amount justly due on the mortgage; but he must also show an excuse for not applying to the court before the sale and preventing a foreclosure for more than was due.<sup>2</sup> But in a case where the mortgagee obtained judgment on an overdue note secured by mortgage, authorizing a sale on foreclosure and providing that any surplus should be applied in satisfaction of the mortgage notes not yet due, and the mortgagee bid in the property for more than the amount of the judgment, it was held that the mortgagor could not redeem on paying the amount of the judgment, but that he must pay the amount of the bid, notwithstanding the fact that the mortgagee had not paid the money into court.<sup>3</sup>

It is the general rule that a mortgagor who goes into equity to redeem must do equity before he can sustain his bill.<sup>4</sup> He will not be permitted to redeem except upon the payment of the debt actually intended to be secured

W. Rep. 616; *Dickerson v. Hayes*, 26 Minn. 100; s. c. 1 N. W. Rep. 834.

As an offset will be entitled to credit for the reasonable rents and profits of the land. *Stallings v. Thomas*, 55 Ark. 326; s. c. 18 S. W. Rep. 184.

Where the decree in a void mortgage foreclosure was in part paid by other means, and the land purchased by the mortgagee for considerably less than the amount of the decree, the mortgagor in redeeming must pay the purchase price, with interest and taxes. *Stallings v. Thomas*, 55 Ark. 326; s. c. 18 S. W. Rep. 184; *Loney v. Courtney*, 24 Neb. 580; s. c. 39 N. W. Rep. 616.

<sup>1</sup> *Stallings v. Thomas*, 55 Ark. 326; s. c. 18 S. W. Rep. 184.

<sup>2</sup> *Dickerson v. Hayes*, 26 Minn. 100; s. c. 1 N. W. Rep. 834.

<sup>3</sup> *Williamson v. Dickerson*, 66 Iowa 105; s. c. 23 N. W. Rep. 286.

<sup>4</sup> *Chamberlain v. Thompson*, 10 Conn. 243; s. c. 26 Am. Dec. 390; *Lee v. Stone*, 5 Gill & J. (Md.) 1; s. c. 23 Am. Dec. 589; *Loney v. Courtney*, 24 Neb. 580; s. c. 39 N. W. Rep. 616; *Comstock v. Johnson*, 46 N. Y. 615; *Cassler v. Shipman*, 35 N. Y. 533; *McDonald v. Neilson*, 2 Cow. (N. Y.) 139; *Tripp v. Cook*, 26 Wend. (N. Y.) 143; *Finch v. Finch*, 10 Ohio St. 501, 507; *Cowlin v. Hartwell*, 5 Clark & F. 484; *Whitaker v. Hall*, 1 Glyn & J. 213; *Hanson v. Keating*, 4 Hare 1, 5, 6.

according to the agreement and real equities between the parties whether that debt is the one secured in the mortgage or not,<sup>1</sup> also upon payment of all collateral debts due from him to the mortgagee, though not included in the mortgage.<sup>2</sup>

§ 1052. Same — Same — Where not made party.— Under those statutes vesting in the mortgagor, unless the mortgage stipulates to the contrary, the legal title and right of possession, in an action by a mortgagor, who was not made a party to the action to foreclose, to redeem from the foreclosure sale, the amount necessary to redeem should be determined with reference both to the right to rents and profits and the liability to pay for improvements.<sup>3</sup>

§ 1053. Same—Same—On redeeming from subsequent lienor-purchaser.—In accordance with the doctrine heretofore laid down,<sup>4</sup> it has been held that where a mortgagee purchases the mortgaged land at a judicial sale, made for the purpose of enforcing the claim of a third person against the mortgagor, under an agreement to reconvey it to the mortgagor when the latter pays him the amount of the mortgage debt, together with the sum expended in the purchase of the land, before a court, which has jurisdiction of the land and the parties, will decree a reconveyance, it will see that the amount of a judgment against the mortgagor, which was a lien on the land in favor of the mortgagee at the time of the purchase, is paid, as well as the mortgage debt and the advances.<sup>5</sup>

§ 1054. Same—By assignee of mortgagor.—We have heretofore seen<sup>6</sup> that a mortgagor coming into equity to

<sup>1</sup> Taft v. Stoddard, 142 Mass. 545; s. c. 8 N. E. Rep. 586; 3 N. Eng. Rep. 103; Upton v. National Bank of So. Reading, 120 Mass. 153; Stone v. Lane, 92 Mass. (10 Allen) 74; Joslyn v. Wyman, 87 Mass. (5 Allen) 62.

<sup>2</sup> Anthony v. Anthony, 23 Ark. 479; Chamberlain v. Thompson, 10 Conn. 243; s. c. 26 Am. Dec. 390; Lee v. Stone, 5 Gill & J. (Md.) 1; s. c. 23 Am. Dec. 589.

But where the mortgagee seeks a foreclosure in chancery, the mortgagor is permitted to redeem upon payment of the mortgage debt alone. Anthony v. Anthony, 23 Ark. 479.

<sup>3</sup> Barrett v. Blackmar, 47 Iowa 565.

<sup>4</sup> See: *Ante*, § 1051.

<sup>5</sup> Hinton v. Pritchard, 107 N. C. 128; s. c. 12 S. E. Rep. 242; 10 L. R. A. 401.

<sup>6</sup> See: *Ante*, § 1051.

redeem the mortgage must pay not only the debt intended to be secured by the mortgage, whether that is the debt described in the mortgage or not, but also all collateral debts between the parties. The rights of an assignee of a mortgagor are not superior to those of the mortgagor himself,<sup>1</sup> consequently the same principle applies to a bill to redeem brought by the grantee of the mortgagor with a knowledge of the facts; and the administrator of the latter stands in no better position.<sup>2</sup>

§ 1055. Same—By third party interested.—In a case where defendants having condemned, by exercise of the right of eminent domain, a part of lands covered by a mortgage, without making the mortgagee a party, and the latter afterwards foreclosed his mortgage without making such defendants parties, and having bought the land at a price which left a large balance due, brought suit to compel the defendants to redeem. The court held that they could not redeem by paying a portion of the mortgage debt proportionate to the value of the land they had condemned to the whole tract, but that they must pay the full amount.<sup>3</sup>

§ 1056. Same — By junior lienor.—We have already seen<sup>4</sup> where the mortgagee seeks to foreclose in equity, the mortgagor will be permitted to redeem upon payment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. And it is equally well settled that a subsequent mortgagee or judgment creditor seeking to redeem, will generally be permitted to do so upon payment of the mortgage debt alone.<sup>5</sup> It has been said that upon the redemption by a

<sup>1</sup> Saunders v. Frost, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394.

<sup>2</sup> Taft v. Stoddard, 142 Mass. 545; s. c. 8 N. E. Rep. 586; 3 N. Eng. Rep. 103; Stone v. Lane, 92 Mass. (10 Allen) 74; Joslyn v. Wyman, 87 Mass. (5 Allen) 62.

<sup>3</sup> Mutual Life Ins. Co. v. Easton & A.R.Co., 38 N.J. Eq. (11 Stew.) 132.

The right of a railroad to

redeem from a mortgage by paying portion of the debt the amount of land held by them bears to the amount of the tract mortgaged, was fully discussed. *Ante*, § 1039.

<sup>4</sup> See: *Ante*, §

<sup>5</sup> Lee v. Stone, 5 Gill S. J. (Md.) 1; s. c. 23 Am. Dec. 589; Saunders v. Frost, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394.

second mortgagee from a first who is in possession, the latter should be credited on account with such reasonable counsel fees as he was obliged to pay in collecting the rents and profits, and he is not liable for damages done to the land by his tenant, without his knowledge, if the tenant is a proper person to lease to; nor for wood, in reasonable quantities, cut and used by such tenant for fuel and repairs.<sup>1</sup> In those cases where a second mortgagee, on seeking to redeem from a prior mortgage, tendered the proper amount on demanding an assignment of the mortgage, and renewed the tender when the senior mortgagee began foreclosure proceedings, the second mortgagee will not be justly chargeable with costs for omitting to keep good the tender in a bill to enforce his right to redeem.<sup>2</sup> There are instances, however, in which the equities of the case will require that junior lienors seeking to redeem shall pay prior liens.<sup>3</sup> Thus it has been said that where A is a first mortgagee, B is a second mortgagee and B, C and D are third mortgagees, and B assigns to A the second mortgage and all his interest in the third mortgage, C and D cannot redeem from A on account of the second mortgage without paying him also the amount of the first mortgage.<sup>4</sup> This is on the principle that a mortgagee who has paid a prior mortgage, or other incumbrance upon the land, is entitled to be repaid the sum so advanced, when the mortgagor, or other person claiming under him, comes in to redeem.<sup>5</sup>

It is thought that where land is sold under a mortgage foreclosure for a sum less than the amount of the judgment,

<sup>1</sup> Hubbard v. Shaw, 94 Mass. (12 Allen) 120.

<sup>2</sup> Lamb v. Jeffrey, 41 Mich. 719; s. c. 3 N. W. Rep. 204.

As to costs on redemption from a foreclosure under a mortgage and sale of the land. See:

<sup>3</sup> Duke v. Beeson, 79 Ind. 24; Saunders v. Frost, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394; Mc-

Cormick v. Knox, 105 U. S. 122; bk. 26 L. ed. 940.

<sup>4</sup> Saunders v. Frost, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394.

<sup>5</sup> McCormick v. Knox, 105 U. S. 122; bk. 26 L. ed. 940. See: Harper v. Ely, 70 Ill. 581; Arnold v. Foot, 7 B. Mon. (Ky.) 66; Page v. Foster, 7 N. H. 392; Robinson v. Ryan, 25 N. Y. 320; Redmond v. Burroughs, 63 N. C. 242.



and a junior incumbrancer comes in to redeem, he will be required to pay the full amount of the judgment.<sup>1</sup>

§ 1057. **Same—Same—Where not made party.**—The amount which must be paid to redeem by a junior incumbrancer who was not made a party to the foreclosure of the senior mortgage, is to be determined from the mortgage and not from the decree.<sup>2</sup> Such a mortgagee not made a party to the foreclosure and sale under a prior mortgage cannot, in an action to require him to redeem or be foreclosed, be required to pay the costs of foreclosure of the former mortgage, or to submit to any unusual exactions as a condition of redeeming.<sup>3</sup> Neither can he be required to pay for improvements put upon the mortgaged premises by a purchaser at such sale with notice of the existence of his mortgage and that it had not been foreclosed.<sup>4</sup> And where the purchaser at a foreclosure sale, removes, without injury to the premises, a house he had built thereon before redemption, a junior mortgagee not a party to the foreclosure, is not bound to pay the value of the house in order to redeem.<sup>5</sup>

§ 1058. **Same—By tenant in common.**—The general rule, believed to be without an exception, is that a tenant in common of an equity of redemption, if he redeems, must pay the whole mortgage debt, and cannot compel the mortgagee to accept such portion of the mortgage debt as is represented by his interest in the land. And having paid the whole mortgage debt, he has no right of contribution against his co-tenants personally, but his only remedy is by a foreclosure of their interests in the land, if they fail to pay their share; and they have the option to pay or give up their interests.<sup>6</sup>

§ 1059. **Same—From subsequent lienor and redemp-**

<sup>1</sup> *Duke v. Beeson*, 79 Ind. 24. See: 438; s. c. 41 N. Y. S. R. 41; 16 N. Y. *Ante*, §§ 1050, 1055. Supp. 267.

<sup>2</sup> *Johnson v. Hosford*, 110 Ind. 572; s. c. 10 N. E. Rep. 407.

<sup>4</sup> *Id.*

<sup>3</sup> *Moulton v. Cornish*, 61 Hun (N. Y.)

<sup>5</sup> *Poole v. Johnson*, 62 Iowa 611; s. c. 17 N. W. Rep. 900.

<sup>6</sup> *Lyon v. Robbins*, 45 Conn. 513.

**tioner.**—In keeping with the general principles already laid down in this chapter, a subsequent mortgagee or other subsequent lienor who has paid a prior mortgage or other incumbrance, is entitled to be repaid when the mortgagor or his vendee, or a subsequent lienor, comes in to redeem.<sup>1</sup> Thus it is said that a judgment creditor who has redeemed from a foreclosure sale five tracts of land sold separately under the decree of foreclosure, is entitled to have the entire amount of his judgment, instead of a proportionate part thereof, paid upon a redemption of one or more of the tracts of land, under the Iowa Code,<sup>2</sup> providing that the terms of redemption in all cases shall be the reimbursement of the amount paid by the holder “added to the amount of his own lien” with interests and costs.<sup>3</sup> And in a case where a junior mortgagee purchases the senior mortgage after sale thereunder, and more than six and less than nine months thereafter, pays the purchaser the amount of his bid, with interest, takes an assignment of the certificate of sale, files an affidavit with the clerk, setting out his mortgage lien and stating that he has redeemed as junior lienholder, and also obtains a deed from the sheriff,—neither the owner of the land nor a purchaser with knowledge of the junior mortgagee’s rights can thereafter redeem without paying both mortgages, until he has established a defense to the junior mortgage.<sup>4</sup> In those cases where the property is amply sufficient for all the liens the court will not, at the instance of a subsequent lien-holder, who redeems from a prior lien-holder and redemptioner, undertake to inquire into the validity of amount due on prior liens, in order to enhance the value of the property in the hands of the last redemptioner.<sup>5</sup>

§ 1060. Consolidation of claims—Tacking.—There are cases where several liens may be united in one action, and

<sup>1</sup> McCormick v. Knox, 105 U. S. socket Sav. Inst. v. Goulden, 28 Fed. 122; bk. 26 L. ed. 940. Rep. 900.

<sup>2</sup> Ia. § 2106.

<sup>3</sup> Case v. Fry, 91 Iowa 132; s. c. 59 N. W. Rep. 333. See: Woon-

<sup>4</sup> Lamb v. West, 75 Iowa 399; s. c. 39 N. W. Rep. 666.

<sup>5</sup> Parker v. St. Martin, 53 Minn. 11 s. c. 55 N. W. Rep. 113.

persons seeking to redeem are required to pay all. Thus one who has executed to different persons two mortgages upon the same land, cannot, after the second mortgage has been foreclosed, and the title under both mortgages united in one person, be let in to redeem from the second mortgage upon payment of the sum secured by the first mortgage.<sup>1</sup> The holder of a purchaser's interest upon a foreclosure or execution sale, in order to tack a subsequent lien to it for the purposes of redemption, must place himself in the line of redemptioners with respect to such subsequent lien, by complying with the statute regulating in the particular instance.<sup>2</sup> We have already seen that a mortgagor coming into equity to redeem must do equity and pay all debts owing from him to the mortgagee;<sup>3</sup> also that a junior incumbrancer redeeming will be allowed to add to his own claim the amount necessarily paid out and expended in redeeming and preserving the property and his lien.<sup>4</sup> The old English doctrine of "tacking" has been abolished in this country, and where tacking to any degree is permitted, it will never be allowed to the injury of other creditors.<sup>5</sup> Thus it has been said that the liens of one whose land has been sold under a decree of chancery for the payment of debts, seeking to enforce against the purchaser their lien for an unpaid balance of the purchase money, by a resale of the premises, cannot tack to it a claim against the purchaser as surety on the bond of their guardian for sums previously paid to and squandered by him, to the exclusion of lien creditors of such purchaser.<sup>6</sup>

<sup>1</sup> *Butler v. Seward*, 92 Mass. (10 Allen) 466.

<sup>2</sup> *Buchanan v. Reid*, 43 Minn. 172; s. c. 45 N. W. Rep. 11.

In England the right of mortgagees holding several mortgages executed by the same mortgagor, although on different property, to consolidate them so that all must be redeemed together if redeemed at all, where they have excluded the application of the English Conveyancing and Law of Property Act 1881, § 17, is

not defeated by the fact that they have given notice, under § 20, to the mortgagor to pay off one of the mortgages in order to acquire a power of sale, and he has prepared for the payment and tendered the money. *Griffith v. Pound*, L. R. 45 Ch. Div. 553.

<sup>3</sup> See: *Ante*, § 1051.

<sup>4</sup> See: *Ante*, § 1056.

<sup>5</sup> *Coombe v. Jordan*, 3 Bland Ch. (Md.) 284; s. c. 22 Am. Dec. 236.

<sup>6</sup> *Lee v. Stone*, 5 Gill & J. (Md.) 1; s. c. 23 Am. Dec. 589.

§ 1061. **Errors in ascertaining amount.**—It is said that an error in ascertaining the amount necessary to redeem land sold under mortgage foreclosure will not defeat the right of the redemptioner, who pays the amount called for in the sheriff's deed, as against the mortgagee, who becomes purchaser at the sale;<sup>1</sup> particularly is this the case where the error is occasioned by the mistake of the mortgagee's attorney in stating to the sheriff the rate of interest specified in the mortgage, and where, though the mortgagee knew of the facts several days before the time of redemption, he took no steps to notify the redemptioner.<sup>2</sup>

§ 1062. **In case of usurious interest.**—We have already seen<sup>3</sup> that a person coming in to redeem from a mortgage foreclosure is entitled to be credited with the statutory penalty on account of usurious interest, so far as the same has not been paid; but no deduction from the incumbrance can be made for usurious interest already paid by the former owner.<sup>4</sup>

The assignee of equity of redemption in case of a mortgage tainted with usury is entitled to the aid of equity to redeem proffering to pay the mortgage debt and simple interest thereon, or by bringing the same into court to be paid to the mortgagee.<sup>5</sup>

§ 1063. **Sum paid to protect title.**—Where a mortgagee has been compelled to pay additional sums of money to protect the estate from forfeiture in consequence of the laches of the mortgagor, to redeem, such mortgagor and

<sup>1</sup> Day v. Cole, 44 Iowa 452; Dodge v. Kennedy, 93 Mich. 547; s. c. 53 N. W. Rep. 795.

Thus in case where, in the decree of foreclosure, the note was, by mistake, assessed at less than its true amount; and the plaintiff purchased the property at execution sale for the amount appearing to be due upon the judgment and costs, the court held that a junior incumbrancer was entitled to

redeem upon payment of the amount bid at the sale. Day v. Cole, 44 Iowa 452.

<sup>2</sup> Dodge v. Kennedy, 93 Mich. 547; s. c. 53 N. W. Rep. 795.

<sup>3</sup> See: *Ante*, § 1037.

<sup>4</sup> Perrine v. Poulson, 53 Mo. 309. See: Kirkpatrick v. Smith, 55 Mo. 389.

<sup>5</sup> Banks v. McClellan, 24 Md. 62; s. c. 87 Am. Dec. 594.

those claiming under him must repay such additional sums.<sup>1</sup> Thus such mortgagee will be allowed for any taxes which may have been paid by him upon the land,<sup>2</sup> as well as the amount of money paid by such mortgagee to protect his interest and to redeem said land from a prior sale for delinquent taxes; the amount paid for such redemption being a lien upon the land as against one who redeems from him, on personal liability of the holder of the legal title for the taxes not affecting the land.<sup>3</sup>

§ 1064. **Permanent improvements—To be paid for—When**—It is a well settled principle that, when one who should have been made a party is omitted from judicial proceedings, the rights of such omitted person remain precisely as they were before the proceedings were instituted; they are neither enlarged nor diminished thereby.<sup>4</sup> Consequently, the obligation of such party redeeming to pay for improvements will not be affected by such sale unless the party seeking to redeem has been guilty of some act or laches in relation to the matter. The general rule in equity is that a mortgagor seeking to redeem from a mortgagee cannot be required to pay for permanent improvements.<sup>5</sup> But there are exceptions to this general rule in those cases where it would be inequitable or unjust to enforce it, as where the party takes possession in good faith under the

<sup>1</sup> Gable v. Seibin, 137 Ind. 155; s. c. 36 N. E. Rep. 844; Goodrich v. Friedersdorff, 27 Ind. 308; Williams v. Hilton, 53 Me. 547; s. c. 58 Am. Dec. 727; Skilton v. Roberts, 129 Mass. 309.

<sup>2</sup> Goodrich v. Friedersdorff, 27 Ind. 308.

<sup>3</sup> Gable v. Seibin, 137 Ind. 155; s. c. 36 N. E. Rep. 844. See: *Ante*, § 1044.

Redemption from tax sale by mortgagee after sale under the mortgage is held in some states not to entitle the mortgagee to recover the sums paid on such tax redemption. Skilton v.

Roberts, 129 Mass. 309; Nopson v. Horton, 20 Minn. 263.

But these cases are not regarded as sound in principle, the tax certificate being simply a transfer of the lien and not a payment of the taxes. See: *Ante*, § 1044.

<sup>4</sup> McGough v. Sweetzer, 97 Ala. 361; s. c. 12 So. Rep. 162; 19 L.R.A. 470.

<sup>5</sup> American Buttonhole, etc., Co. v. Burlington Mut. Loan Assoc., 68 Iowa 326; s. c. 27 N. W. Rep. 271; Montgomery v. Chadwick, 7 Iowa 114; Moore v. Cable, 1 John. Ch. (N. Y.) 384.



belief that he is sole owner, with the consent, expressed or implied, of the mortgagor or junior lien holder; or where they have, for a considerable length of time, failed to assert their right to redeem, to permit this to be done, except on condition that permanent improvements to be paid for;<sup>1</sup> and the fact that the purchaser had constructive notice of the rights of the junior lienholder is immaterial.<sup>2</sup>

In those cases where the mortgagor or owner of the equity of redemption, or a junior lienholder, redeems after foreclosure and sale, to which he was not made a party, under such circumstances as to entitle the purchaser who has entered into possession to be paid the value of improvements made by the purchaser, such redemptioner will be entitled to offset against the value of such improvements the rents and profits received by the purchaser.<sup>3</sup>

§ 1065. **Rents and profits—Applicable on sum payable—When.**—The question of accounting for rents and profits on redemption having already been discussed in the chapter on terms and conditions on which redemption may be allowed,<sup>4</sup> it remains but to consider when the redemptioner is entitled to have rents and profits applied on, or deducted from, the sum payable on redemption. We have already seen<sup>5</sup> that where improvements of a permanent character have been made on the land by the purchaser, under such circumstances that he is entitled to be compen-

<sup>1</sup> *Roberts v. Fleming*, 53 Ill. 198; *Frost v. Davis*, 31 Ind. 34; *American Buttonhole, etc., Co. v. Burlington Mut. Loan Assoc.*, 68 Iowa 326; s. c. 27 N. W. Rep. 271; *Montgomery v. Chadwick*, 7 Iowa 114; *Bacon v. Cottrell*, 13 Minn. 194; *Mickles v. Dillaye*, 17 N. Y. 80; *Green v. Dixon*, 9 Wend. (N. Y.) 485; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470.

<sup>2</sup> *American Buttonhole, etc., Co. v. Burlington Mut. Loan Assoc.* 68 Iowa 326; s. c. 27 N. W. Rep. 271; *Mickles v. Dillaye*, 17 N. Y. 80.

<sup>3</sup> See: *McGough v. Sweetzer*,

97 Ala. 361; s. c. 12 So. Rep. 169; 19 L. R. A. 470; *McCabe v. Bellows*, 73 Mass. 148; s. c. 66 Am. Dec. 467; *Newton v. Cook*, 70 Mass. (4 Gray) 46; *Brown v. Lapham*, 57 Mass. (3 Cush.) 554; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146; *Van Duyne v. Shann*, 39 N. J. Eq. (12 Stew.) 6; *Mills v. Van Voorhies*, 20 N. Y. 412; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Ross v. Boardman*, 22 Hun (N. Y.) 527.

<sup>4</sup> See: *Ante*. § 1042.

<sup>5</sup> See: *Ante*, §§ 1048, 1064.

sated therefor, the redemptioner is entitled to have deducted from this amount the rents and profits the property would reasonably have earned.

The general rule is that the mortgagor is entitled to redeem without paying rent, where he has been permitted to remain in possession of the mortgaged premises;<sup>1</sup> but where the mortgagee has taken and received the rents and profits of the mortgaged premises, on redemption, the mortgagor is entitled to have applied in reduction of the sum to be paid the net proceeds of such rents and profits as were received, or as might have been received by the exercise of due diligence,<sup>2</sup> together with interest thereon, in some states,<sup>3</sup> but in other states not.<sup>4</sup>

<sup>1</sup> *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276; s. c. 71 Am. Dec. 713. See: *Harrison v. Wyse*, 24 Conn. 1; s. c. 63 Am. Dec. 151.

<sup>2</sup> *Harrison v. Wyse*, 24 Conn. 1; s. c. 63 Am. Dec. 151. See: *Powell v. Williams*, 14 Ala. 476; s. c. 48 Am. Dec. 105; *Hogan v. Stone*, 1 Ala. 496; s. c. 35 Am. Dec. 39; *Benham v. Rowe*, 2 Cal. 387; s. c. 56 Am. Dec. 342; *Breckinridge v. Brooks*, 2 A. K. Marsh. (Ky.) 335; s. c. 12 Am. Dec. 401; *Schaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 548; s. c. 47 Am. Dec. 211; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470.

A mortgagee in possession must account not only for the rents, but for the damages and costs required in ejectment suit, and for what the mortgagor would have realized from the crops growing on the premises at the time of the ouster, less the probable cost of cultivation. *Powell v. Williams*, 14 Ala. 476; s. c. 48 Am. Dec. 105.

A mortgagee should not be charged with rents which accrue from improvements he made upon the mortgaged premises. *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470.

<sup>3</sup> *Breckinridge v. Brooks*, 2 A. K. Marsh. (Ky.) 335; s. c. 12 Am. Dec. 401; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146.

<sup>4</sup> *Hogan v. Stone*, 1 Ala. 496; s. c. 35 Am. Dec. 39; *Schaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 547; s. c. 47 Am. Dec. 211.

In the case of *Hogan v. Stone*, 1 Ala. 496; s. c. 35 Am. Dec. 39, the court considered the question of interest on rents, and said, among other things: "In England, where interest is not charged on the account taken of the rents and profits, unless there be some peculiarity in the case; as where no interest is in arrears, when the mortgagee takes possession: *Shepard v. Elliott*, 4 Madd. 254; or where the rent greatly exceeds the interest of the mortgage debt; in which event annual rents are directed to be made, and after the payment of the interest, the excess is applied to sink the principal: See the cases cited in which this principle is established, in *Powell on Mortgages*, 949a, and *Coote on Mortgages*, 556. So in the case of *Breckinridge v. Brooks*, 2 A. K. Marsh. (Ky.) 340; s. c. 12 Am. Dec. 401, which was elaborately considered

But a mortgagee in possession will not be liable for not leasing the property differently, and for rents and profits he might thus have received, where he is not charged with negligence or improper conduct.<sup>1</sup> All that is required of a mortgagee in possession in the management of the property is such as a prudent man would exercise over his own property<sup>2</sup>, and is bound to the same diligence to make the property productive that such owner would use<sup>3</sup> and must not permit or commit waste.<sup>4</sup>

on a rehearing, it was determined that the mortgagee in possession was not chargeable with interest on rent received. These decisions, in our opinion, are founded in justice. The mortgagor can, at any time, regain the possession of the property by paying the debt. If he does not do so, and the mortgagee is at the trouble of paying himself, is it not reasonable that he should be charged with interest on the amount thus received, in small sums and at remote intervals, which are never of so much value as when the whole amount is received at once?

"In *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146, the court charged the the mortgagee in possession with interest on the rents and profits; but that case was decided on its own circumstances, the court considering that the widow was precluded by the purchase of the mortgage from claiming her dower without filing a bill to redeem, and the court declined determining the general rule. But, in that case, it is to be observed that five per cent. commission was allowed on the rents and profits received by the assignee of the mortgage. There are peculiar circumstances in this case which would make it improper to charge interest on the rents received, as the defendant was in possession under a purchase; and is only a constructive mortgagee in possession; but we prefer to rest

the case on the general rule applicable to such cases, which is, that a mortgagee in possession is not chargeable with interest on the rent or profits of the estate, unless there be some circumstances connected with the transaction making it proper he should be so charged."

<sup>1</sup> *Benham v. Rowe*, 2 Cal. 387; s.c. 56 Am. Dec. 342.

<sup>2</sup> *Id.*

<sup>3</sup> *Shaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 548; s. c. 47 Am. Dec. 211.

<sup>4</sup> *Shaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 548; s. c. 47 Am. Dec. 211; *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534.

In the case of *Shaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 547; s. c. 47 Am. Dec. 211, in discussing the question on diligence, the court say: "Is it sufficient for the mortgagee, thus in possession, in order to relieve himself from any charge for rents and profits for the years during which the premises were thus vacant, simply to say that he could not rent them; or should he be held to show proper diligence to procure a tenant? Is the mortgagor to prove that he might have rented it but for his wilful default, as that he turned out a sufficient tenant, or refused to receive a sufficient tenant, as would seem to be held in *Anonymous*, 1 Vern. 45; or does the fact of the premises being left vacant throw upon

In those cases where the purchaser at a foreclosure sale removes a house he has put upon the property, without injury to the premises, before redemption is made, he cannot be compelled to account to the redemptioner for the rents and profits of such house.<sup>1</sup>

It has been held in Massachusetts that the occupation of a house on mortgaged premises by a husband and wife, the latter being the mortgagee, under an agreement between the husband and the wife's mother, who is supposed to be the owner of part of the premises, is not such a "possession of the premises" by the mortgagee, within the meaning of the statute of that state,<sup>2</sup> as will entitle the mortgagor, on a bill in equity to redeem, to have the rent of the tenement applied towards the payment of the mortgage debt.<sup>3</sup>

§ 1066. **Costs on—Attorney's fees.**—We have already seen<sup>4</sup> that as one of the terms or conditions of letting in the mortgagor to redeem, the court may require the payment of the costs of the suit. The general rule is that the mortgagor coming in to redeem must pay the costs of the foreclosure suit.<sup>5</sup> But we have already seen that an allowance for attorney's fee, stipulated for in the mortgage, is not one of the items of costs that can be charged to the redemptioner;<sup>6</sup> and where such a fee is paid, under protest, on redemption from a statutory foreclosure, it may be recovered back.<sup>7</sup> The reason for this is said to be because a stipulation in a mortgage, fixing in advance a gross allowance for the attorney's fee in the event of foreclosure at law, is against public policy and cannot be enforced.<sup>8</sup>

the mortgagee the burden of proving reasonable diligence to procure a tenant, as seems to be held in *Metcalf v. Campion*, 1 Moll. 238? It seems to me, that it will not do for the mortgagee, having thus taken possession, to fold his arms and use no means to procure a tenant; and I am disposed to think he ought to be held to show reasonable diligence to procure a tenant. But at all events, if the farm and buildings are not rented, he ought to cause the farm to be tilled, and that in a husbandlike manner."

<sup>1</sup> *Poole v. Johnson*, 62 Iowa 611; s. c. 17 N. W. Rep. 900. See: *Spurgen v. Adamson*, 62 Iowa 661; s. c. 18 N. W. Rep. 293.

<sup>2</sup> Mass. Gen. Stat. c. 140, § 15.

<sup>3</sup> *Sanford v. Pierce*, 126 Mass. 146.

<sup>4</sup> See: *Ante*, § 1043.

<sup>5</sup> *Blum v. Mitchell*, 59 Ala. 535.

<sup>6</sup> See: *Ante*, § 1046.

<sup>7</sup> *Vosburgh v. Lay*, 45 Mich. 455; s. c. 8 N. W. Rep. 91.

<sup>8</sup> *Id.*

## CHAPTER XLIV.

### REDEMPTION—CONTRIBUTION ON.

§ 1067. Contribution—Generally.  
 1068. Same — Where mortgaged  
                   lands sold in parcels.  
 1069. Same — By subsequent  
                   grantee.

§ 1070. Same—By widow.  
 1071. Same—Redemption without,  
                   when.

§ 1067. Contribution—Generally.—By contribution is understood the share provided by or due from one or several persons to assist in discharging a common obligation, or in advancing a common enterprise.<sup>1</sup> In case of redemption from mortgage, either before or after foreclosure, contribution means the payment by each of two or more persons who are interested in the equity of redemption, to another person interested in the equity of redemption, who has redeemed the premises of his proportionate part of the money necessarily expended in effecting such redemption, and applies, alike, where the equities existing between the parties are equal<sup>2</sup> or unequal.<sup>3</sup> Hence, any person with an interest in land subject to a mortgage, is entitled to redeem from such mortgage and call upon other persons interested in the equity of redemption for contribution.<sup>4</sup>

§ 1068. Same — Where mortgaged land sold in parcels.—The general rule is that tracts of land sold by a

<sup>1</sup> Anderson's Law Dict. 251; II. Cent. Dic. & Cyc. 1236.

<sup>2</sup> Chase v. Woodbury, 60 Mass. (6 Cush.) 143.

<sup>3</sup> Young v. Williams, 17 Conn. 393; Kingsbury v. Buckner, 70 Ill. 514; Beall v. Barclay, 10 B. Mon. (Ky.) 261; Barley v. Myrick, 50 Me. 171; Aiken v. Gale, 37 N. H. 501; Stevens v. Cooper, 1 John. Ch. (N. Y.) 245; s. c. 7 Am. Dec. 499; Cheesbrough v. Millard, 1 John. Ch. (N. Y.) 409;

(1662)

Stroud v. Casey, 27 Pa. St. 471; Wheeler v. Willard, 44 Vt. 640; McLaughlin v. Curts, 27 Wis. 644; Herbert's Case, 3 Co. 14; Harris v. Ingleden, 3 Pr. Wms. 98, 99.

<sup>4</sup> Palk v. Clinton, 12 Ves. 48; s. c. 8 Rev. Rep. 283. See: Lyons v. Robinson, 45 Conn. 513; Johnson v. Candage, 31 Me. 28; Ney v. Patterson, 35 Mich. 413; Jennings v. Jordan, L. R. 6 App. Cas. 698; s. c. 51 L. J. Ch. 129; 5 L. T. 593.



mortgagor after the execution of the mortgage are liable for the mortgage debt in the inverse order of alienation,<sup>1</sup> and this is equally true whether the land as originally mortgaged, consisted of separate tracts of land,<sup>2</sup> or of a single tract broken up into lots and sold at various time, to different parties;<sup>3</sup> the same is true where the mortgagor conveys the entire mortgaged tract to a grantee who afterwards reconveys to different parties at different times the whole or a portion thereof.<sup>4</sup>

<sup>1</sup> Mobile Marine Dock & Mut. Ins. Co. v. Huder, 35 Ala. 713; Bank v. Dundas, 10 Ala. 611; Haskell v. State, 31 Ark. 101; Ritch v. Eichelberger, 13 Fla. 169; Sidener v. White; 46 Ind. 595; Kendall v. Hodgins, 7 Abb. (N. Y.) Pr. 317; s. c. 1 Bosw. (N. Y.) 67; Kellogg v. Rand, 11 Paige Ch. (N. Y.) 59; Skeel v. Sparker, 8 Paige Ch. (N. Y.) 195; Kiersted v. Avery, 4 Paige Ch. (N. Y.) 13; James v. Hubbard, 1 Paige Ch. (N. Y.) 233; Martin v. Wagener, 1 T. & C. (N. Y.) 513; Steere v. Steere, 7 Week. Dig. (N. Y.) 433; Reynolds v. Tooker, 18 Wend. (N. Y.) 593.

<sup>2</sup> Mobile Marine Dock & Mut. Ins. Co. v. Huder, 35 Ala. 713; Cummings v. Cummings, 3 Ga. (3 Kelly) 460; Wikoff v. Dows, 4 N. J. Eq. (3 H. W. Gr.) 224; Dutton v. Updike, 3 N. J. Eq. (2 H. W. Gr.) 125; Shannon and Marcilis, 1 N. J. Eq. (1 Saxt.) 413; Clowes v. Dickenson, 5 John. Ch. (N. Y.) 235; Kelly v. Rand, 11 Paige Ch. (N. Y.) 59; Schryver v. Teller, 9 Paige Ch. (N. Y.) 173; Keel v. Sparker, 8 Paige Ch. 181; Guion v. Knapp, 6 Paige Ch. (N. Y.) 35; Gouverneur v. Lynch, 5 Paige Ch. (N. Y.) 300; Commercial Bank v. Western Reserve Bank, 11 Ohio 444; Stoney v. Shultz, 1 Hill (S. C.) Eq. 500; Conrad v. Harrison, 3 Leigh (Va.) 532.

<sup>3</sup> Mobile Marine Dock & Mut. Ins.

Co. v. Huder, 35 Ala. 713; Bank v. Dundas, 10 Ala. 611; Sanford v. Hill, 46 Conn. 42; Ritch v. Eichelberger, 13 Fla. 169; Cummings v. Cummings, 3 Ga. (3 Kelly) 460; Meacham v. Steele, 93 Ill. 135; Hahn v. Behrman, 73 Ind. 120; Windsor v. Evans, 72 Iowa 692; s. c. 34 N. W. Rep. 481; Sheperd v. Adams, 32 Me. 63; Beard v. Fitzgerald, 105 Mass. 134; George v. Wood, 91 Mass. (9 Allen) 80; Kilborn v. Robbin, 90 Mass. (8 Allen) 466; George v. Kent, 89 Mass. (7 Allen) 16; Bradley v. George, 84 Mass. (2 Allen) 292; Chase v. Woodbury, 60 Mass. (6 Cush.) 143; Allen v. Clark, 34 Mass. (17 Pick.) 47; Hall v. Edwards, 43 Mich. 473; s. c. 5 N. W. Rep. 652; Johnson v. Williams, 14 Minn. 260; Brown v. Simmons, 44 N. H. 475; Hiles v. Coult, 30 N. J. Eq. (3 Stew.) 40; Coles v. Appleby, 87 N. Y. 114; Hopkins v. Wolley, 81 N. Y. 77; Carpenter v. Cooms, 20 Pa. St. 222; Meng v. Houser, 13 Rich. (S. C.) Eq. 210; Miller v. Rogers, 49 Tex. 398; Root v. Collins, 44 Vt. 173; Jones v. Myrick, 8 Gratt. (Va.) 179; Aiken v. Milwaukee & St. P. R. Co. 37 Wis. 469.

<sup>4</sup> Wikoff v. Dows, 4 N. J. Eq. (3 H. W. Gr.) 224; Gulon v. Knapp, 6 Paige Ch. (N. Y.) 35.

An exception to this rule seems to prevail in Iowa, (Barney v. Myers,

The equity existing between the purchasers at different times from the mortgagor is one which the mortgagee must regard where he has either actual or constructive notice thereof<sup>1</sup> and he will not be permitted to in any way interfere with his equity by releasing a part of the mortgaged premises which, in equity, is primarily liable for the payment of his debt.<sup>2</sup>

§ 1069. **Same—By subsequent grantee.**—The right of contribution from subsequent grantee for a portion of the mortgaged premises cannot be settled in a suit in equity to redeem from the mortgagor, unless such grantee is made a party to the bill.<sup>3</sup>

§ 1070. **Same—By widow.**—The wife must contribute ratably to a redemption of a mortgage already on the premises. Where the heir redeems and pays off a mortgage, and she files a bill against him for dower, she should contribute by paying, during her life, to the heir, one-third of the interest on the amount paid by him, to be computed by a master from the time of such payment.<sup>4</sup> But where

28 Iowa 742) and Kentucky (Poston v. Eubank, 3 J. J. Marsh. (Ky.) 42), where it is held that the parcels of land must contribute ratably.

In other states it is held that where the conveyance is made by the mortgagor without warranty, the grantors must contribute ratably. See: Erlinger v. Bul, 7 Ill. App. 440; Aiken v. Gale, 37 N. H. 501; Carpenter v. Cooms, 20 Pa. St. 222.

<sup>1</sup> George v. Wood, 91 Mass. (9 Allen) 80; Parkman v. Welch, 36 Mass. (19 Pick.) 231; Brown v. Simmons, 44 N. H. 475.

<sup>2</sup> Jordan v. Hamilton County Bank, 11 Neb. 499; s. c. 9 N. W. Rep. 654; Hoyt v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 571; Stuyvesant v. Hall, 2 Barb. (N. Y.) 156; Guion v. Knapp, 6 Paige Ch. (N. Y.) 35.

<sup>3</sup> Lamb. v. Montague, 112 Mass.

354; George v. Wood, 91 Mass. (9 Allen) 80; s. c. 85 Am. Dec. 741.

<sup>4</sup> Swaine v. Perine, 5 John. Ch. (N. Y.) 482; s. c. 9 Am. Dec. 318. See: McMahon v. Russell, 17 Fla. 705; Gibson v. Crehore, 22 Mass. (5 Pick.) 146; Pollard v. Noyes, 60 N. H. 185; Norris v. Morrison, 45 N. H. 494; Woods v. Wallace, 30 N. H. 384; Hastings v. Stevens, 29 N. H. 564; Rossiter v. Cossit, 15 N. H. 38; Cass v. Martin, 6 N. H. 25; Denton v. Nanny, 8 Barb. (N. Y.) 618; Gunning v. Carman, 3 Redf. (N. Y.) 71.

The widow having only a life interest in the dower, say the court in the case of Swaine v. Perine, 5 John. Ch. (N. Y.) 482; s. c. 9 Am. Dec. 318, payment of the entire one-third of the debt would be unjust. It would be making her pay for a life

that is inconvenient or embarrassing, the value of such annuity may be directed to be deducted from the amount, her age and health considered.<sup>1</sup> But in no manner is she to be charged more than the proportional part which she should be required to pay.<sup>2</sup> It is thought, however, that where the case presents no question between the widow and the owner of the equity of redemption, who has redeemed in fact, or who is to be regarded as having done so by equitable construction, no question of contribution arises for the reason that there has been no redemption. In those cases, however, where the equity of redemption is exercised by a purchaser, the widow is entitled to dower only by contributing her portion of the mortgage debt.<sup>3</sup>

§ 1071. Same—Redemption without—When.—It is said that where one takes a deed of warranty to a portion of a parcel of land, the whole of which is subject to a mortgage, may maintain a bill in equity to redeem the same against a subsequent assignee of the mortgage, without contribution, in those cases where the remaining portion of

estate equally as if it was an estate in fee. The more accurate rule would appear to be, that she should "keep down one-third of the interest of the mortgage debt, by paying during her life, to the defendant, the interest of one-third part of the aggregate amount of the principal and interest of the mortgage debt paid by the defendant, to be computed from the date of such payment."

"As it would be inconvenient and embarrassing to charge her with such an annuity, then let the value of such annuity from the plaintiff (her age and health considered) be ascertained by one of the masters of the court, and be deducted from the amount of the rents and profits so coming to her; and if that value should exceed the amount of the rents and profits so coming to her, that then, the residue of such value

be deducted from the dower to be assigned to her, out of the house and land mentioned in the bill."

<sup>1</sup> *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482; s. c. 9 Am. Dec. 318; *Gunning v. Carman*, 3 Redf. (N. Y.) 71.

<sup>2</sup> *Cox v. Garst*, 105 Ill. 347; *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482; s. c. 9 Am. Dec. 318. See: *Selb v. Montague*, 102 Ill. 446; *Hearsthorne v. Hearsthorne*, 2 N. J. Eq. (1 H. W. Gr.) 349; *Russel v. Austin*, 1 Paige Ch. (N. Y.) 192.

<sup>3</sup> *Trowbridge v. Sypher*, 55 Iowa 352; s. c. 7 N. W. Rep. 567; *Bank of Commerce v. Owens*, 31 Md. 327; s. c. 1 Am. Rep. 64; *Van Vronkman v. Eastman*, 48 Mass. (7 Met.) 157; *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482; s. c. 9 Am. Dec. 318; *Danforth v. Smith*, 23 Vt. 247.

the land is sufficient to satisfy the mortgage debt in full, although such assignee may also have become the owner of the equity of redemption of the remaining portion of the land.<sup>1</sup> In the case of *Bradley v. Nathan*,<sup>2</sup> one Daniels, who was the owner of fifteen acres of land, mortgaged the same to Godfrey and Mayhew and afterwards conveyed six acres by deed of warranty to the plaintiff. Subsequently to both these conveyances Daniels became insolvent and his right in equity to redeem the remaining nine acres was conveyed by his assignees in insolvency to one Nathaniel Cheeseman, who mortgaged the same to the defendant. The defendant then procured an assignment to himself for the original mortgage to Godfrey and Mayhew and entered to foreclose it for breach of condition. The plaintiff asked in his bill that the defendant release to him the parcel of about six acres which he held under the deed of warranty from Daniels without contribution by him toward the first mortgage. It was admitted that the value of the nine acres was fully sufficient to satisfy the first mortgage without contribution and the court held, on the authority of *Chase v. Woodbury*,<sup>3</sup> that the plaintiff was entitled to the decree prayed for in the bill.

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<sup>1</sup> *Bradley v. Nathan*, 84 Mass. (2 Allen) 392; *Chase v. Woodbury*, 60 Mass. (6 Cush.) 143. See: *Dooley v. Potter*, 140 Mass. 49, 59; *Beard v. Fitzgerald*, 105 Mass. 134; *George v. Wood*, 91 Mass. (9 Allen) 80; *Kilborn, v. Robbins*, 90 Mass. (8 Allen) 466, 470.

<sup>2</sup> 84 Mass. (2 Allen) 392. ]

<sup>3</sup> 60 Mass. (6 Cush.) 143.

## CHAPTER XLV.

### REDEMPTION—ACTION TO REDEEM.

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| <p>§ 1072. Bill to redeem—Introductory.</p> <p>1073. Same—Accounting for rents and profits.</p> <p>1074. Same—Dismissal of—Effect.</p> <p>1075. Same—Evidence on.</p> <p>1076. Same—Irregularity waived by.</p> <p>1077. Same—Jurisdiction.</p> <p>1078. Same—Multifariousness.</p> <p>1079. Same—Requisites of—Tender.</p> <p>1080. Same—Same—In action by grantee.</p> <p>1081. Same—Same—In action by junior lienor.</p> <p>1082. Same—Statutory provisions.</p> <p>1083. Same—Time within which to be filed.</p> <p>1084. Same—When to be brought.</p> <p>1085. Defenses — Conveyance to mortgagee.</p> <p>1086. Same—Conveying wrong lot.</p> <p>1087. Same—Improvements with knowledge.</p> | <p>§ 1088. Same—Mortgage fraudulent as to creditors.</p> <p>1089. Same — Overdue second mortgage.</p> <p>1090. Improvements — Allowance for.</p> <p>1091. Receiver on — When appointed.</p> <p>1092. Parties to action — Parties plaintiff.</p> <p>1093. Same—Parties defendant.</p> <p>1094. The decree—Generally.</p> <p>1095. Same—Time of redemption after decree.</p> <p>1096. Same—Same—Extension.</p> <p>1097. Same—Where sold in parcels.</p> <p>1098. Same—On bill by widow.</p> <p>1099. Same—Sale not decreed.</p> <p>1100. Same—Accounting for value.</p> <p>1101. Same — Appeal and new trial.</p> <p>1102. Costs on redemption.</p> |
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§ 1072. Bill to redeem—Introductory.—In those states in which the distinction between law and equity is still maintained, and in the code states, the remedy for enforcing the right of redemption is an equitable one, and governed by equitable rules.<sup>1</sup> Where an action to redeem from a mortgage is statutory, it is an action of a nature sufficiently equitable to bring the plaintiff within the rule that he who

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<sup>1</sup> See: *Woods v. Woods*, 66 Me. 206; *Pearce v. Savage*, 45 Me. 90; *Parsons v. Welles*, 17 Mass. 419; *Hill v. Payson*, 3 Mass. 559; *Craft v. Bul-  
lard*, 1 Smeed & M. Ch. (Miss.) 366;

*Jackson v. Cunningham*, 28 Mo. App. 354; *Pell v. Ulmar*, 18 N. Y. 139; *Douglas v. Woodworth*, 51 Barb. (N. Y.) 79.



seeks equity must do equity.<sup>1</sup> Thus, the amount of the judgment against the mortgagor, which was a lien on the land in favor of the mortgagee at the time of the purchase, must be paid, as well as the mortgage debt and the advances.<sup>2</sup>

§ 1073. Same—Accounting for rents and profits.—The general rule is that a personal judgment may be given in an action to redeem from a sale under the power in a mortgage, and for an accounting of the rents and profits, although not prayed for in the pleadings.<sup>3</sup>

Hence on a bill to redeem from a mortgage, where the mortgagee has been in possession, the latter will be charged with the rents actually received, and what could have been received by reasonable care and diligence.<sup>4</sup> But the mort-

<sup>1</sup> *Shaw v. Abbott*, 61 N. H. 254; *Hinton v. Pritchard*, 107 N. C. 128; s. c. 12 S. E. Rep. 242; 10 L. R. A. 401; *Evans v. Pike*, 118 U. S. 241; bk. 30 L. ed. 234; s. c. 6 Sup. Ct. Rep. 1090.

In Louisiana, one having an interest in mortgaged land who was not made a party to a foreclosure cannot dispossess the purchaser without offering to redeem; and his remedy, in a federal court, is by bill in equity to redeem, not by an action at law for the possession. *Evans v. Pike*, 118 U. S. 241; bk. 30 L. ed. 234; s. c. 6 Sup. Ct. Rep. 1090.

<sup>2</sup> *Hinton v. Pritchard*, 107 N. C. 128; s. c. 10 L. R. A. 401; 12 S. E. Rep. 242.

<sup>3</sup> *Johnson v. Loftin* (N. C.), 16 S. E. Rep. 179; 111 N. C. 319. See: *Farmer v. Farmer*, 74 Ala. 285; *Ware v. Crotty*, 66 Ill. 197; *Dunsmore v. Savage*, 68 Me. 191; *Parker v. Child*, 125 N. J. Eq. (10 C. E. Gr.) 41.

In Alabama, a mortgagor is entitled to all rents and profits accruing after tender of redemption. *Farmer v. Farmer*, 74 Ala. 285.

In Maine, where a party conveyed land with a covenant against incumbrances, and took a mortgage to secure a part of the purchase money. On a bill to redeem, the court held that he was not chargeable for use and occupation by a third party holding possession without right and without his consent. *Dinsmore v. Savage*, 68 Me. 191.

In New Jersey, a first mortgagee purchasing, if redeemed, must account for the rents and profits during his occupation of the premises, and cancel any mortgage given by himself thereon, after he had received his deed. *Parker v. Child*, 25 N. J. Eq. (10 C. E. Gr.) 41.

<sup>4</sup> *Harper v. Ely*, 70 Ill. 581. See: *Blum v. Mitchell*, 59 Ala. 535; *Powell v. Williams*, 14 Ala. 476; s. c. 48 Am. Dec. 105; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Rooney v. Crary*, 11 Ill. App. 213; *Crossman v. Card*, 143 Mass. 152; s. c. 9 N. E. Rep. 514; 3 N. Eng. Rep. 429; *Gerrish v. Black*, 104 Mass. 400; *Shouler v. Bonander*, 80 Mich. 531; s. c. 145 N. W. Rep. 487; *Millard v. Truax*, 73

gagagee should be charged with the rent of the land only from the time he was let into the occupancy of the premises,

Mich. 381; s. c. 41 N. W. Rep. 328; Posten v. Miller, 60 Wis. 494; s. c. 19 N. W. Rep. 540. COMPARE: Hall v. Westcott, 17 R. I. 504; s. c. 23 Atl. Rep. 25.

Equity has jurisdiction of a suit by a mortgagor against a mortgagee in possession to redeem, and for an account of rents and profits. Posten v. Miller, 60 Wis. 494; s. c. 19 N. W. Rep. 540.

In a suit to redeem against a mortgagee in possession brought by the mortgagor's grantee and assignee of the lands, the latter is entitled to an accounting and to have any balance above expenses applied on the mortgage. Shouler v. Bonander, 380 Mich. 531; s. c. 45 N. W. Rep. 487.

Mortgagor may show the actual amount of rents and profits obtained by the mortgagee while in possession. Rooney v. Crary, 11 Ill. App. 213.

But it is proper, on a bill to redeem, for the master to disallow a mortgagee's account made up from memory only after the lapse of several years, and to make a computation himself based upon the evidence. Hall v. Westcott, 17 R. I. 504; s. c. 23 Atl. Rep. 25.

Mortgagee is chargeable with the actual rents and profits received by him from the time he entered into possession, and is to be credited with annual taxes paid by him. The balance remaining each year should be applied first to the extinguishment of the interest on the mortgage debt, and the remainder, if any, to the principal. Blum v. Mitchell, 59 Ala. 535.

In Gerrish v. Black, 104 Mass. 400,

on a bill in equity to redeem lands from a mortgage, it appeared that the defendant, who had entered to foreclose, lived in another state, and appointed an agent to manage the property; and there was no evidence of negligence in the appointment of the agent, or of fraud on the part of the mortgagee. The court held that without other evidence of negligence than the testimony of the mortgagor's witnesses, as experts, that a higher rent could have been obtained, the mortgagee should not be charged with a greater amount than he received as rent.

**Rents and damages.**—Mortgagee refusing to allow redemption and ejecting the mortgagor from possession, must account not only for the rents, but for the damages and costs recovered in the ejectment suit, and for what the mortgagor would have realized from the crop growing on the premises at the time of the ouster, less the probable cost of cultivation, etc. Powell v. Williams, 14 Ala. 476; s. c. 48 Am. Dec. 105.

In New Jersey an assignee of a mortgage has further security for a debt which has been previously secured by a lease by the mortgagee of the premises as collateral cannot be charged by the mortgagor, on a bill to redeem, with the rents collected by the mortgagee before the assignment, but never paid over to the assignee, who was merely to apply them on the debt at the end of the term of the lease. Hall v. Westcott, 17 R. I. 504; s. c. 23 Atl. Rep. 25.

**Interest on.**—In a suit in equity to redeem certain parcels of land from several mortgages given to the defend-

and interest must not be charged upon the rents from the end of the year when they accrued, but the rents should be first applied at the end of the year to extinguish the interest for that year; and if a balance of rent remains it should be applied *pro tanto* to the payment of the principal.<sup>1</sup> Where an action is brought to redeem property that is open, unenclosed, and without buildings, and the mortgagee's possession was merely constructive, he should not be charged anything for its use and occupation.<sup>2</sup> And where there have been needed improvements which facilitate the enjoyment of the estate or enhance the value they may be set off against rents and profits;<sup>3</sup> and the mortgagee should be allowed for taxes paid by him, if he is required to pay rent for his occupancy.<sup>4</sup>

But an account of rents and profits is not an inseparable incident to a decree for redemption against a mortgagee in possession,<sup>5</sup> and when allowed a sum equal to the interest on the money borrowed should not in such case be allowed as rent, where the possession was worth nothing.<sup>6</sup> In those cases where there has been long delay, and acquiescence in the claim of the mortgagee to ownership, it is said that the

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ant's testator, on an accounting by the master under an order of the court, defendant ought to be charged with interest on items of credit to which plaintiff was found entitled by the master who stated the account between the parties. *Crossman v. Card*, 143 Mass. 152; s. c. 9 N. E. Rep. 514; 3 N. Eng. Rep. 429.

<sup>1</sup> *Powell v. Williams*, 14 Ala. 476; s. c. 48 Am. Dec. 105.

<sup>2</sup> *Peugh v. Davis*, 113 U. S. 542; bk. 28 L. ed. 1127.

<sup>3</sup> But he will not be allowed to receive pay for his alleged improvements in cutting away timber. *Equitable Trust Co. v. Fisher*, 106 Ill. 189. See: *Parmer v. Parmer*, 74 Ala. 285; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Millard v. Truax*, 73 Mich. 331; s. c. 41 N. W. Rep. 328.

Any excess over the improvements cannot be recovered of the mortgagee while in possession under foreclosure sale. *Parmer v. Parmer*, 74 Ala. 285.

<sup>4</sup> *Millard v. Truax*, 73 Mich. 331; s. c. 41 N. W. Rep. 328.

<sup>5</sup> *Russell v. Southard*, 53 U. S. (12 How.) 139; bk. 13. L. ed. 927.

In order to recover in separate action, from a purchaser in possession, for rents and profits, the mortgagor must show that he was prevented by accident, fraud, or mistake from considering them when he made his offer to redeem. *Barret v. Blackmar*, 47 Iowa 565.

<sup>6</sup> *Peugh v. Davis*, 113 U. S. 542; bk. 28 L. ed. 1127.

account of interest due on the loan, and of the rent and profits of the land commence at the date of the filing of the bill.<sup>1</sup>

§ 1074. Same—Dismissal of—Effect.—A bill to redeem, like any other bill in equity, will be dismissed for want of jurisdiction,<sup>2</sup> and in some cases where brought without leave and without authority and unsworn to, as required by the rules of practice,<sup>3</sup> will be dismissed. Thus it has been said that where a bill in equity brought to redeem mortgaged premises on the day before a foreclosure would have become absolute, is made returnable in the wrong county, and dismissed for want of jurisdiction, and no tender has been made of the amount due, and there has been no contract to extend the time of redemption, a bill to redeem, brought nearly a year after the dismissal of the former bill, should be dismissed.<sup>4</sup> The effect of a simple dismissal of a bill to redeem,<sup>5</sup> or failure to perform the decree,<sup>6</sup> is an immediate and absolute foreclosure,<sup>7</sup> and the

<sup>1</sup> Russell v. Southard, 53 U. S. (12 How.) 139; bk. 13, L. ed. 927.

<sup>2</sup> See: *Post*, §§ 1072, 1077.

<sup>3</sup> See: Sanford v. Haines, 71 Mich. 116; s. c. 38 N. W. Rep. 777; 15 West. Rep. 193.

<sup>4</sup> Webb v. Nightingale, 96 Mass. (14 Allen) 374.

See: Bancroft v. Sawin, 143 Mass. 144.

**Delay is ground for dismissal of bill.** Thus where a plaintiff filed a bill in equity to redeem from a mortgage, and did nothing further for two years, the court held that, in its discretion, it might dismiss the bill, and that the fact of its being a bill to redeem did not affect the case. Bancroft v. Sawin, 143 Mass. 144.

<sup>5</sup> Goodenow v. Curtis, 33 Mich. 505.

<sup>6</sup> **It is error to direct a dismissal of a bill to redeem if the plaintiff fail to pay within three months.** In

default of payment, a sale with the usual statutory right of redemption should have been ordered. Hollingsworth v. Koon, 117 Ill. 511; s. c. 6 N. E. Rep. 148; 8 *Id.* 193.

<sup>7</sup> Hollingsworth v. Koon, 117 Ill. 511; s. c. 6 N. E. Rep. 148; 8 *Id.* 193; Beach v. Cooke, 28 N. Y. 535; s. c. 86 Am. Dec. 260. See: Kolle v. Clausheidt, 99 Ind. 100; Shannon v. Speers, 2 A. K. Marsh. (Ky.) 311; Pitman v. Thornton, 66 Me. 469; Stevens v. Miner, 110 Mass. 57, 59; Gerrish v. Black, 109 Mass. 474; Borromscale v. Tuttle, 22 Mass. (5 Pick.) 377; Goodenow v. Curtis, 33 Mich. 505; Brown v. Simmons, 45 N. H. 211; Bolles v. Duff, 43 N. Y. 474; s. c. 10 Abb. (N. Y.) Pr. N. S. 414; 41 How. (N. Y.) Pr. 359; Sherwood v. Hooker, 1 Barb. Ch. (N. Y.) 650; Quinn v. Brittain, 1 Hoffm. Ch. (N. Y.) 353; Perine v. Dunn, 4 John. Ch. (N. Y.) 140; Waller v. Harris, 7

adjudication by a referee, that the mortgage shall be forever foreclosed, upon the neglect of the mortgagor to redeem at the time specified in his award, is unobjectionable, as it only declares what would be the legal effect of his award, if it were silent upon the question of foreclosure.<sup>1</sup> The usual form of a decree letting in a party to redeem is that in case of default made in the payment of the sum decreed to be paid within the time allowed, that the bill be dismissed.<sup>2</sup>

§ 1075. **Same—Evidence on.**—In those jurisdictions where the mortgagor and mortgagee may legally agree that the mortgage shall stand as security for a debt other than that described in the mortgage, on a bill to redeem, the mortgagee may show by oral testimony what was the real debt or obligation which the mortgage was given to secure, or that after it was given, the parties agreed that it should be held as security for a new and different debt.<sup>3</sup>

In those cases where there has been a conditional sale and a conveyance absolute on its face, and plaintiff seeks to redeem therefrom, the burden of proof is upon him to show that his offer to redeem was made within the time provided by the conditions under which the conveyance was made.<sup>4</sup> Where the bill is not brought for six years after the foreclosure, evidence can not be received impeaching the authority of an attorney to enter, in the foreclosure suit, the appearance of a purchaser under an execution sale made subject to the mortgage more than a year before the foreclosure suit, such purchaser being aware of the foreclosure, and selling his certificate of purchase to the complainant without taking any steps to redeem, and the premises mean-

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Paige Ch. (N. Y.) 167; Jenkins v. Elridge, 1 Woodb. & M., C. C. 61; Wood v. Surr, 19 Beav. 551; Hansard v. Hardy, 18 Ves. 460; Winchester v. Paine, 11 Ves. 199; s. c. 8 Rev. Rep. 131.

<sup>1</sup> Pitman v. Thornton, 66 Me. 469.

<sup>2</sup> Cowing v. Rogers, 34 Cala. 655;

Shannon v. Speers, 2 A. K. Marsh. (Ky.) 698; Perine v. Dunn, 4 John. Ch. (N. Y.) 140.

<sup>3</sup> Taft v. Stoddard, 141 Mass. 150; s. c. 6 N. E. Rep. 836; 3 N. Eng. Rep. 101.

<sup>4</sup> Bridges v. Linder, 60 Iowa 190; s. c. 14 N. W. Rep. 217.



while being occupied by several successive grantees under the foreclosure title.<sup>1</sup>

In a case where a first mortgagee, after obtaining a decree of foreclosure, but without a sale thereunder, went into possession of the mortgaged premises under a quit claim deed from the mortgagor's vendee. A second mortgagee, who had foreclosed and obtained the usual deed, filed a bill to redeem. The court held that the facts established a *prima facie* case for the complainants, and threw upon the defendant the burden of proving a paramount title.<sup>2</sup>

It is thought that where suit is brought against both the mortgagor and the mortgagee by one claiming to be the assignee of the mortgagor, for the purpose of setting up the assignment and redeeming, it is necessary to prove that the assignment was for a valuable consideration. But if the suit is against the mortgagor alone it is sufficient to prove the assignment without proving any consideration.<sup>3</sup>

§ 1076. Same—Irregularities waived by.—Filing a bill to redeem from a foreclosure sale is a waiver of any objections the redemptioner might otherwise make to the regularity and sufficiency of the sale. Thus it has been said that a bill by a mortgagor to redeem, treating the sale as valid, is a waiver of irregularities in that the land was sold at a different place from that named in the deed, and without the appraisement required by law.<sup>4</sup> In those cases where a decree of foreclosure is interposed, by the party obtaining it, as an objection to a redemption, which, but for the effect of the decree, would be just and reasonable, its irregularity, as well as any other circumstance for which it ought to be set aside or modified, will be considered on the question whether the time for redemption shall be further extended. And the validity of the decree, in such case, is gone into, not as a technical question of evidence, but as being of itself a ground of relief to the party seeking to redeem.<sup>5</sup>

<sup>1</sup> Kenyon v. Shreck, 52 Ill. 382.

<sup>4</sup> Dailey v. Abbott, 40 Ark. 275.

<sup>2</sup> Farmers', &c., Bank v. Bronson,  
14 Mich. 361.

<sup>5</sup> Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556; s. c. 73 Am. Dec. 688. See: Littell v. Zuntz, 2 Ala. 256; s. c. 36 Am. Dec. 415;

<sup>3</sup> Medley v. Mask, 4 Ired. (N. C.)  
Eq. 339.

§ 1077. **Same—Jurisdiction.**—Jurisdiction to redeem from a mortgage either before or after sale, is a matter of local statute or rules of practice. But the general rule is that a bill to redeem lands from a sale under a mortgage should be filed in the county where jurisdiction *in personam* can be obtained over the mortgagee, without reference to the *situs* of the land.<sup>1</sup>

It has been said that the New Jersey statute authorizing courts of law to enforce equities of redemption, in certain cases, by compelling the mortgagee to reconvey the mortgaged premises, upon payment into court of the money secured by the mortgage, is not applicable to any case in which the mortgagor is himself the actor.<sup>2</sup>

The supreme court of Michigan, in the case of *Sanford v. Haines*,<sup>3</sup> say that a decree of foreclosure for fifty dollars more than the amount due, does not, as a separate grievance, give a court of equity jurisdiction to let in to redeem the mortgagor or those claiming under him.

§ 1078. **Same—Multifariousness.**—A bill to redeem from a mortgage may be bad for multifariousness. But a bill by a mortgagor to avoid a sale under the power in the mortgage and to redeem, seeking relief in the alternative under a special agreement between himself and mortgagee, or as a legal right from their relations, is not multifarious.<sup>4</sup> And in a case where a bill to redeem, and, in settling the balance due on the mortgage, to rectify errors in a running account under a contract for printing and selling certain

*Seymour v. Davis*, 35 Conn. 271; *Millspaugh v. McBride*, 7 Paige Ch. (N. Y.) 509; s. c. 34 Am. Dec. 360.

A regularly enrolled decree cannot be altered, as a general rule, except by bill in review. *Lillie v. Shaw*, 59 Ill. 76.

Decree by default may be opened, it is thought, to let in a defense on the merits of which a party has been deprived by the negligence of his counsel. *Thompson v. Golding*, 87 Mass. (5 Allen.) 82; *Nash v. Wet-*

more, 33 Barb. (N. Y.) 159; *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 639; *Tripp v. Vincent*, 8 Paige Ch. (N. Y.) 180; *Millspaugh v. McBride*, 9 Paige Ch. (N. Y.) 509; s. c. 34 Am. Dec. 360.

<sup>1</sup> *Kanawha Coal Co. v. Kanawha, &c., Coal Co.*, 7 Blatchf. C. C. 391, 415. See: *Smith v. Larrabe*, 58 Me. 361.

<sup>2</sup> *Shields v. Lozeau*, 34 N. J. L. (5 Vr.) 496.

<sup>3</sup> 71 Mich. 116; s. c. 38 N. W. Rep. 777; 15 West. Rep. 193.

<sup>4</sup> *Adams v. Sayre*, 70 Ala. 318.

calicoes, was held by the supreme court of Rhode Island not to be multifarious; and the complainant's claim to have certain prices allowed him, not to be in the nature of unliquidated damages, and to admit of being set off.<sup>1</sup>

§ 1079. **Same—Requirements of—Tender.**—The general rule is that the bill to redeem must offer to pay the amount found to be due;<sup>2</sup> but such tender is not indispensable

<sup>1</sup> *Greene v. Harris*, 10 R. I. 382.

<sup>2</sup> *Kennebec & P. R. Co. v. Portland & K. Co.*, 54 Me. 173; *Loney v. Courtney*, 24 Neb. 580; 39 s. c. N. W. Rep. 616; *Kemp v. Mitchell*, 36 Ind. 249; *McClelland v. A. P. Cook Co.*, 94 Mich. 528; s. c. 54 N. W. Rep. 298.

See: *Fouche v. Swain*, 80 Ala. 151; *Adams v. Sayre*, 70 Ala. 318; *Lehman v. Collins*, 69 Ala. 127; *Stocks v. Youngs*, 67 Ala. 341; *Draughdrill v. Sweeney*, 41 Ala. 310; *Crews v. Treadgill*, 35 Ala. 334; *Holt v. Rees*, 46 Ill. 181; *Nesbit v. Hanway*, 87 Ind. 400; *Kemp v. Mitchell*, 36 Ind. 249; *Anson v. Anson*, 20 Iowa 55; s. c. 89 Am. Dec. 514; *Meaher v. Howes* (Me. 1887), 10 Atl. Rep. 460; 4 N. Eng. Rep. 776; *Pitman v. Thornton*, 66 Me. 469; *Way v. Mullett*, 149 Mass. 49; *Gerrish v. Black*, 122 Mass. 76; *McClelland v. A. P. Cook Co.*, 94 Mich. 528; s. c. 54 N. W. Rep. 298; *Dayton v. Dayton*, 68 Mich. 437; s. c. 30 N. W. Rep. 209; 13 West. Rep. 69; *Sardeson v. Menage*, 41 Minn. 314; s. c. 43 N. W. Rep. 66; *Hoopes v. Bailey*, 28 Miss. 328; *Edgerton v. McRea*, 6 Miss. (5 How.) 183; *Loney v. Courtney*, 24 Neb. 580; s. c. 39 N. W. Rep. 616; *Eastman v. Thayer*, 60 N. H. 408; *Perry v. Carr*, 41 N. H. 371; *Champion v. Joslyn*, 44 N. Y. 648; *Silsbee v. Smith*, 41 How. Pr. (N. Y.) 418; *Beekman v. Frost*, 18 John. Ch. (N. Y.) 544; s. c. 9 Am. Dec. 246; *Barton v. May*, 3

*Sandf. Ch. (N. Y.)* 450; *Still v. Buzzell*, 60 Vt. 478; s. c. 12 Atl. Rep. 209; 5 N. Eng. Rep. 644; *Kopper v. Dyer*, 59 Vt. 477; s. c. 9 Atl. Rep. 4; 4 N. Eng. Rep. 368; *Brobst v. Brock*, 77 U. S. (10 Wall.) 519; s. c. *sub nom.* *Doe ex d. Brobst v. Roe*, bk. 19 L. ed. 1002; *Dalter v. Hayter*, 7 Beav. 319; *Tasker v. Small*, 3 Myl. & C. 63; *Harding v. Pingey*, 10 Jur., N. S. 872. See: *Ante*, § 1036.

A bill in equity to redeem, is not good unless it contains a formal offer to pay whatever sum may be found due upon taking the account. *Kemp v. Mitchell*, 36 Ind. 249.

**Same—The supreme court of Nebraska**, in the case of *Loney v. Courtney*, 24 Neb. 580; s. c. 39 N. W. Rep. 616, say that in an action in equity to redeem from an alleged voidable mortgage foreclosure, the mortgagor must offer to pay what is equitably due under the decree, with interest and taxes.

A bill to set aside a mortgage foreclosure and for a discharge of the mortgage lien on a claim that a tender was made of the amount due, is not maintainable where there is no evidence that an unconditional tender of the amount due was made, and all the surrounding circumstances, as well as defendant's testimony, contradict the claim. *McClelland v. A. P. Cook Co.*, 94 Mich. 528; s. c. 54 N. W. Rep. 298.

to the right to maintain the bill.<sup>1</sup> Such a bill should distinctly and unequivocally set out the facts.<sup>2</sup> Thus in a bill to redeem and for a general accounting, a general averment that the balance due, if any, was inconsiderable, and that the purchasers at a sale under the mortgage bought with knowledge of the true state of the account, is too indefinite;<sup>3</sup> yet a bill to redeem may properly be framed with a double

<sup>1</sup> *Beach v. Cooke*, 28 N. Y. 508; s. c. 86 Am. Dec. 260. See: *Dennis v. Tomlinson*, 49 Ark. 568; *Decker v. Patton*, 120 Ill. 464; s. c. 11 N. E. Rep. 897; 9 West. Rep. 501, aff'g 20 Ill. App. 210; *Catterlin v. Armstrong*, 79 Ind. 584; *Millett v. Blake*, 81 Me. 531; *Brown v. So. Boston Sav. Bank*, 148 Mass. 300; *Kline v. Vogel*, 90 Me. 239; s. c. 2 S. W. Rep. 408; 6 West. Rep. 647; *Watkins v. Watkins*, 57 N. H. 462; *Hall v. Hall*, 46 N. H. 240; *Polk v. Mitchell*, 85 Tenn. 634.

In Arkansas, where plaintiff has paid the mortgage, or the mortgagee has paid himself out of rents and profits, it is sufficient to one payment and demand on accounting. *Dennis v. Tomlinson*, 49 Ark. 568.

In Illinois an offer to redeem is neither necessary nor material, in a bill for redemption. *Decker v. Patton*, 20 Ill. App. 210, aff'd in 120 Ill. 464; s. c. 11 N. E. Rep. 897; 9 West. Rep. 501.

In Indiana the rule is same as in Arkansas. *Catterlin v. Armstrong*, 79 Ind. 514.

In Missouri, in an equitable action to redeem, on payment of the balance found to be due, it is unnecessary that a tender of the money should be made in the petition, or that the money be paid into court. *Kline v. Vogel*, 90 Mo. 239; s. c. 2 S. W. Rep. 408; 6 West Rep. 647.

In New Hampshire, even without a tender or demand of ac-

count, a bill to redeem a mortgage can be maintained, as the special provisions of the statute allowing remedy by petition do not supersede the general remedy in equity. *Hall v. Hall*, 46 N. H. 240.

Thus it is said that a bill to redeem a mortgage, which goes upon the ground that the defendant fraudulently prevented the plaintiff from reasonably redeeming, and neglected to render, when requested, a statement of the sum due, should not be dismissed because there has not been a tender of the amount due, which payment can be provided for by the decree. *Watkins v. Watkins*, 57 N. H. 462.

In Tennessee a redemption bill is not defective because the redemption money is not brought into court; certainly not, where there has been a tender, where plaintiff offers to pay, where the bill has not been demurred to, and where defendant absolutely denies plaintiff's right to redeem. *Polk v. Mitchell*, 85 Tenn. 634.

<sup>2</sup> A bill in equity against a railroad corporation in possession to redeem the railroad from a mortgage, must allege that the defendant corporation has some title in the mortgage, or must aver information and belief of the same. It must also allege a formal offer to pay what may be found due. *Kennebec, &c., R. R. Co. v. Portland, &c., R. R. Co.*, 54 Maine, 173.

<sup>3</sup> *Conner v. Smith*, 74 Ala. 115.

aspect, so that the complainant may avail himself of a tender if his proof thereof shall be sufficient, or, failing in that, pray an account and be permitted to pay the amount found due. Regularly, however, the prayer should be in the alternative.<sup>1</sup> In some states a bill to redeem must show affirmatively that the party claiming the equity of redemption was not made a defendant in the action for foreclosure,<sup>2</sup> and in others the bill to redeem must distinctly allege the debtor's delivery of possession to the purchaser within a stipulated time.<sup>3</sup> Upon a bill to redeem, where there are no peculiar facts and circumstances taking the case out of the ordinary rule, the complainant cannot claim as a right to have a decree entered for the sale of the mortgaged premises, as in case of foreclosure subject to the statutory right of redemption.<sup>4</sup>

§ 1080. Same—Same—In action by grantee.—It is thought that on a bill brought by the grantee of the mortgagor, the offer to redeem is sufficient in praying that the plaintiff be allowed to pay such sum as shall be found due on the mortgage; it is not necessary that he should offer to pay in such distinct terms as to constitute, if accepted, an enforceable contract.<sup>5</sup> An amendment to a bill by such grantor or purchaser of the equity of redemption, admitting the equity to be in the mortgagor, and seeking redemption as a mere judgment creditor, is inadmissible, because radically changing the right of action.<sup>6</sup>

§ 1081. Same—Same—In action by junior lienor.—A bill to redeem, filed by a junior against a senior mortgagee, is a recognition of the validity of the older mortgage, and, in some jurisdictions, the redemptioner must offer to pay the amount due on it.<sup>7</sup> In a case where one who files

<sup>1</sup> Gooding v. Riley, 50 N. H. 400.

<sup>2</sup> Dervin v. Jennings, 4 Neb. 97.

<sup>3</sup> Stocks v. Young, 67 Ala. 341.

<sup>4</sup> Decker v. Patton, 20 Ill. App. 210, aff'd 120 Ill. 464; s. c. 11 N. E. 897; 9 West. 501.

<sup>5</sup> Brown v. South Boston Sav. Bank, 148 Mass. 300.

Mass. Pub. Stats., c. 181, §§ 27, 33, are construed by the court in the above case, in arriving at the conclusion set out in the text.

<sup>6</sup> Rapier v. Gulf City Paper Co., 69 Ala. 476.

<sup>7</sup> Fouché v. Swain, 80 Ala. 151.



a bill to redeem from a mortgage avers that he owns a certain mortgage which is subsequent to his own, and his bill is not demurred to, it may be sustained notwithstanding he fails to set forth such facts as show that his mortgage and that from which he seeks to redeem are mortgages in the same chain of title. Especially is this true when it appears that the defendant has recognized his right to make payments by receiving interest from him.<sup>1</sup> But where, in an action by a junior mortgagee to redeem mortgaged premises from a sale thereof, under a decree of foreclosure of the equity of redemption on a prior mortgage, it appeared that the plaintiff was not a party to the decree, and that he held an unrecorded mortgage at the commencement of the foreclosure suit, and the complaint did not aver that either the holder of the senior mortgage or the purchaser had notice of the unrecorded mortgage, the court held the complaint bad on demurrer.<sup>2</sup>

§ 1082. Same—Statutory provisions.—In most of the states, if not all of them, there are statutory provisions regulating actions to redeem. These statutes must be strictly complied with. Thus, under a statute<sup>3</sup> requiring a party redeeming to file within twenty-four hours the documents produced to the person or officer from whom the redemption is made, being intended for the benefit of subsequent redemptioners, they alone, if anyone, can take advantage of an omission to comply with its provisions.<sup>4</sup> Under the Missouri statute,<sup>5</sup> the right to redeem from a sale under a trust deed exists only when the *cestui que trust*, his assignee, or some one for one of them, becomes purchaser; and no party can redeem until he shall have given security at the date of sale.<sup>6</sup>

<sup>1</sup> Lamb v. Jeffrey, 47 Mich. 28; s. c. 10 N. W. Rep. 65.

<sup>2</sup> Harlock v. Barnhizer, 30 Ind. 370.

<sup>3</sup> Minn. L. 1881, Ex. Sess., c. 3.

<sup>4</sup> Wilson v. Hayes, 40 Minn. 531; s. c. 4 L. R. A. 196; 40 Alb. L. J. 8; 42 N. W. Rep. 467.

<sup>5</sup> Mo. Rev. Stat., §§ 3298, 3299.

<sup>6</sup> Dawson v. Egger, 97 Mo. 36; s. c. 11 S. W. Rep. 61; Updike v. Merchants' Elevator Co., 96 Mo. 160; s. c. 8 S. W. Rep. 779; 15 West. Rep. 263.

§ 1083. **Same—Time within which to be brought.**—The time within which a bill is to be brought is regulated by the local statutes or rules of the particular court in which the action is brought. Laches, and the running of the statute of limitation,<sup>1</sup> among other things, bars the bringing of a bill to redeem. All possible indulgence is to be accorded to persons seeking to redeem, who have acted in good faith throughout. Thus, it has been said that a court of chancery, when it ascertains that the object of a deed absolute in form is to give security for a debt, will relieve the mortgagor from the consequences of his failure to redeem in time, although the parties intended time to be of the essence of the contract.<sup>2</sup> And, on the other hand, in a case where the creditor assented to an extension of the time of payment of a debt secured by mortgage, but no definite time was fixed, and suit was not brought to foreclose the mortgage for nearly three and a half years, and the debtor, long before suit, intimated that, on a designated contingency which had occurred, he would not resume payments, and the facts showed he made no effort to pay when he could have done so; on a bill by the debtor to redeem from a sale under the mortgage, the court held that the creditor was under no duty to notify him before instituting proceedings to foreclose, and that such assent to extend the time of payment afforded no equitable ground for relief.<sup>3</sup>

§ 1084. **Same—When to be brought.**—In all cases where there is a statute regulating the time within which an action shall be brought to redeem from a mortgage, or a mortgage foreclosure, that statute must be strictly com-

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<sup>1</sup> In a case where the action was not brought by the purchaser of the equity of redemption until three years after the sale, and after expenditures by the purchaser for repairs, insurance, etc., and after complainant had frequently refused to pay the debt, and appeared to acquiesce in the action of defendant in making the improvements, the court held that the bill

should be dismissed for laches, although the statute of limitations at law had not run between the time of the sale and the time of the suit brought. *Kline v. Vogel*, 90 Mo. 239; s. c. 2 S. W. Rep. 408; 6 West. Rep. 647.

<sup>2</sup> *Jackson v. Lynch*, 129 Ill. 85; s. c. 22 N. E. Rep. 246.

<sup>3</sup> *Seymour v. Bailey*, 66 Ill. 288.

plied with.<sup>1</sup> Thus, the supreme court of Minnesota, in the case of *Gates v. Ege*,<sup>2</sup> say that an action to redeem real estate from a sale made upon foreclosure of a mortgage which is a first lien upon the premises, and also from a decree afterwards made in proceedings to enforce a mechanic's lien, brought by one as owner, will be dismissed where it clearly appears that the plaintiff has permitted the time within which he should, under the statute,<sup>3</sup> have brought his action to expire without taking steps to enforce his rights. The supreme judicial court of Massachusetts, in the case of *Flanders v. Hall*,<sup>4</sup> hold substantially the same doctrine. In *Pancake v. Cauffman*,<sup>5</sup> where an action was brought by a grantor to enforce an alleged equity of redemption, claiming that the deed was subject to a parol defeasance, was not brought until more than twenty years after the execution of the deed, the land meanwhile having passed into the hands of a purchaser for value without notice of such equity, the court held that that fact, together with the facts that plaintiff knew of the defendant's purchase, and then made no claim of title, and surrendered the land to the defendant, and paid rent to defendant's grantor, and acquiesced in defendant's title until the value of the property largely increased, showed laches which would prevent a recovery.

§ 1085. **Defenses—Conveyance to mortgagee.**—We have already seen<sup>6</sup> that the mortgagor may sell the equity of redemption in the mortgaged property to the holder of the mortgage, and that such an arrangement will be upheld by the courts where fairly conducted and based on a valuable consideration. In conformity with this principle, it has been said that a conveyance of mortgaged premises by the

<sup>1</sup> See: *Flanders v. Hall*, 159 Mass. 95; s. c. 34 N. E. Rep. 178; *Gates v. Ege*, 57 Minn. 465; s. c. 59 N. W. Rep. 495; *Pancake v. Cauffman*, 114 Pa. St. 113; s. c. 6 Atl. Rep. 67; 5 Cent. Rep. 205.

<sup>2</sup> 57 Minn. 465; s. c. 59 N. W. Rep. 495.

<sup>3</sup> Minn. Gen. Stat., 1878, c. 81, §§ 13, 14.

<sup>4</sup> 159 Mass. 95; s. c. 34 N. E. Rep. 178.

<sup>5</sup> 114 Pa. St. 113; s. c. 6 Atl. Rep. 67; 5 Cent. Rep. 205.

<sup>6</sup> See: *Ante*, § 907.

mortgagor to the mortgagee in satisfaction of the debt, is color of title; and if the grantee pays taxes on the land, while it is vacant, for more than seven years thereafter, this will constitute a good defense to a suit to redeem the premises by a person claiming by virtue of an execution sale and deed of the premises under a judgment rendered against the mortgagor before his conveyance to the mortgagee.<sup>1</sup>

§ 1086. **Same—Conveying wrong lot.**—A mutual mistake is always relieved against in equity; hence, it has been said that a deed conveying another lot of land than that intended, is not wholly void, and such mistake is not a defense in favor of a third party in possession, as against the grantee's mortgagee seeking to redeem from a prior mortgage.<sup>2</sup> In such a case, the mortgage is effectual to pass title as between the parties thereto.<sup>3</sup> In *Edwards v. Roys*,<sup>4</sup> the court say: "The conveyance is only void as to the person holding adversely, and those who subsequently come in under him. As to all others, the conveyance is valid, and passes the title or interest from the grantor to the grantee." In the subsequent case of *Hall v. Westcott*,<sup>5</sup> this court quoted this language, and add: "We think this doctrine is certainly true in equity."

§ 1087. **Same—Improvements with knowledge.**—The supreme court of Missouri, in the case of *Nelson v. Sarre*,<sup>6</sup> say that in a suit to redeem from a purchaser at a mortgage sale,

<sup>1</sup> *McCagg v. Heacock*, 34 Ill. 476; s. c. 85 Am. Dec. 327. See: *Royal v. Lessee of Lisle*, 15 Ga. 545; s. c. 60 Am. Dec. 712; *Hassett v. Ridgley*, 49 Ill. 202; *City of St. Louis v. Gorman*, 29 Mo. 593; s. c. 77 Am. Dec. 586; *Bailey v. Carlton*, 12 N. H. 9; s. c. 37 Am. Dec. 190; *Green v. Kellum*, 23 Pa. St. 254; s. c. 62 Am. Dec. 332; *Edgerton v. Byrd*, 6 Wis. 527; s. c. 70 Am. Dec. 473.

<sup>2</sup> *Hall v. Westcott*, 17 R. I. 373; s. c. 5 Atl. Rep. 629; 2 N. Eng. Rep. 537.

<sup>3</sup> *Hall v. Westcott*, 17 R. I. 373; s. c. 5 Atl. Rep. 629; 2 N. Eng. Rep. 887. See: *Wade v. Lindsey*, 47 Mass. (6 Met.) 407; *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Betsey v. Torrance*, 34 Miss. 132, 138; *Livingston v. Pure Iron Co.*, 9 Wend. (N. Y.) 511, 523; *University of Vermont v. Joslyn*, 21 Vt. 52, 61; *Edwards v. Roys*, 18 Vt. 473.

<sup>4</sup> 18 Vt. 473.

<sup>5</sup> 17 R. I. 373; s. c. 5 Atl. Rep. 629; 2 N. Eng. Rep. 887.

<sup>6</sup> 75 Mo. 386.

It is no defense that he has made improvements with the knowledge of the mortgagor if the improvements do not exceed the rents in value, and are in the nature of customary repairs, and there has been no loss of evidence preventing a full presentation of the case.<sup>1</sup>

§ 1088. Same—Mortgage fraudulent as to Creditors.—An intention to delay creditors is no defense to an action for redemption;<sup>2</sup> hence, where a bill to redeem is brought by a second mortgagee against the assignee of a prior mortgage, the latter cannot interpose the objection, that the second mortgage is fraudulent as to creditors of the mortgagor.<sup>3</sup> The same rule applies to a deed absolute in terms, but in intention and legal effect a mortgage.<sup>4</sup>

§ 1089. Same — Overdue second mortgage.—The supreme judicial court of Massachusetts, in the case of *Gerrish v. Black*,<sup>5</sup> say that it is no defense to a bill to redeem from a mortgage that the defendant holds a second mortgage on the same premises which is overdue; and on a subsequent bill in equity to obtain the discharge of the second, he is not estopped to set up the second, the same not having been set up in previous proceedings.

§ 1090. Improvements—Allowance for.—It is a general rule that the mortgagee in possession can not make improvements at the expense of the redemptioners,<sup>6</sup> and the making of improvements is no defense to an action to redeem from a foreclosure.<sup>7</sup> But in those cases where a purchaser under the foreclosure of a senior mortgage makes permanent improvements in good faith, with the consent,

<sup>1</sup> This doctrine is fully sustained by the discussion upon the subject of improvements and compensation therefor, to be found, *Post*, § 1090.

<sup>2</sup> *Crooker v. Holmes*, 65 Me. 195; *Livingston v. Ives*, 35 Minn. 55; s. c. 27 N. W. Rep. 74; *Baldwin v. Burt*, 43 Neb. 245; s. c. 61 N. W. Rep. 601.

<sup>3</sup> *Crooker v. Holmes*, 65 Me. 195;

*Baldwin v. Burt*, 43 Neb. 245; s. c. 61 N. W. Rep. 601.

<sup>4</sup> *Livingston v. Ives*, 35 Minn. 55; s. c. 27 N. W. Rep. 74.

<sup>5</sup> 122 Mass. 76. See: Same case in 113 Mass. 486; 109 Mass. 474; 104 Mass. 400, and 99 Mass. 315.

<sup>6</sup> *Horn v. Indianapolis Nat. Bk.*, 125 Ind. 381; s. c. 25 N. E. Rep. 550; 9 L. R. A. 676.

<sup>7</sup> See: *Ante*, § 1087.



express or implied, of a junior incumbrancer who was not a party to the foreclosure, the latter, on redeeming, must pay for the improvements.<sup>1</sup> And where in redemption proceedings it appeared that defendants' purchase was with notice of the equity of redemption, but that there was no want of good faith in his assertion of title as against the owner of the equity; that plaintiff was present, but did not openly assert his claim when defendant took possession; and that plaintiff suffered defendant to expend considerable sums in making improvements before objecting, the court held that the defendant, after the commencement of the action, might complete his improvements so as to make them useful, and might recover their value as of the time of the rendition of the decision.<sup>2</sup> But where, on a bill to redeem, the defendant, by the decree, is allowed his improvements, plaintiff on the hearing may show that there are no improvements;<sup>3</sup> and in those cases where improvements have been made, he may contest their reasonableness, although he did not object to them when he saw defendant making them.<sup>4</sup>

§ 1091. Receiver on—When appointed,—In the case of the Boston and Providence Railroad Corporation v. The New York and New England Railroad Company,<sup>5</sup> it is said that in an action brought to redeem property from a mort-

<sup>1</sup> American Button-Hole, &c. Co. v. Burlington Mut. Loan Assoc., 68 Iowa 326; s.c. 27 N. W. Rep. 271.

<sup>2</sup> Hadley v. Stewart, 65 Wis. 481; s. c. 27 N. W. Rep. 380. See: Freichnecht v. Meyer, 39 N. J. Eq. (12 Stew.) 551, reversing 38 N. J. Eq. (11 Stew.) 315.

Thus in a case where a mortgagee bid in the mortgaged premises at a sale under an execution obtained by him on a debt other than the judgment debt. The mortgagor, supposing the execution sale to be valid, surrendered possession, and the mortgagee erected improvements. On ascertaining that

the sale was void, because of defects in the return, etc., the mortgagor filed a bill to redeem. The court held that, as a condition of redemption, he must pay the mortgagee the value of the improvements. Freichnecht v. Meyer, 39 N. J. Eq. (12 Stew.) 551; reversing 38 N. J. Eq. (11 Stew.) 315.

<sup>3</sup> He need not pay for a building burned before he released his equity, but after the negotiation for the release was concluded. Merriam v. Goss, 139 Mass. 77.

<sup>4</sup> *Id.*

<sup>5</sup> 12 R. I. 220.

gage foreclosure, a receiver will not be appointed of the property so long as a balance remains due to the mortgagee in possession, except in those cases where such mortgagee in possession is mismanaging the property.<sup>1</sup>

§ 1092. Parties to action—Parties plaintiff.—As in an action to foreclose a mortgage<sup>2</sup> the proper party plaintiff in an action to redeem from a mortgage, whether before or after breach or sale, is the party seeking to redeem as the owner of the equity of redemption, or as one having an interest therein, the real party in interest should be the plaintiff,<sup>3</sup> whether he be the original mortgagor,<sup>4</sup> his as-

<sup>1</sup> In *Chapin v. Jones*, 11 R. I. 86, 90, the court say: "The doctrine contended for by the plaintiff was also held by the supreme judicial court of Massachusetts in a replevin case, *Howe v. Freeman*, 80 Mass. (14 Gray) 566. But this case was carried to the supreme court of the United States and there reversed, *Freeman v. Howe*, 15 U. S. (24 How.) 450, 457; bk. 16 L. ed. 749; where the opinion was delivered by Nelson J., one of the oldest and most learned and experienced justices of the court. This case, as observed by Mr. Justice Miller, in *Buck v. Colbath*, 70 U.S. (3 Wall.) 341; bk. 18 L. ed. 257, took the profession by surprise, as overruling the decision of the supreme judicial court of Massachusetts and the opinion of Chancellor Kent. But it was upon this very point expressly affirmed by the United States Supreme court in *Buck v. Colbath*, 70 U. S. (3 Wall.) 334, 341; bk. 18 L. ed. 257. It is said that the marshall on execution against A has no right to levy upon the property of B, which is claimed to be the present case. The one point decided in those two later cases was, that in such a case a court from which the process issues must of necessity decide the question, and the case of

*Brooks v. Montgomery*, 23 La. An. 450, is exactly in point."

<sup>2</sup> See: *Ante*, c. V.

<sup>3</sup> See: *Thomas v. Jones*, 84 Ala. 302; 4 So. Rep. 270; *Commercial Real Estate & Bldg. Assoc. v. Parker*, 84 Ala. 298; s. c. 4 So. Rep. 268; *Butts v. Braighton*, 72 Ala. 294; *Hudson v. Kelly*, 70 Ala. 393; *Lilly v. Dunn*, 96 Ind. 270; *Welch v. Stearns*, 69 Me. 192; *Hilton v. Lathrop*, 46 Me. 297; *Farnum v. Metcalf*, 62 Mass. (8 Cush.) 46; *Putnam v. Putnam*, 21 Mass. (4 Pick.) 139; *Saunders v. Frost*, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394; *Smith v. Manning*, 9 Mass. 422; *Harwood v. Underwood*, 28 Mich. 427; *Sutherland v. Rose*, 47 Barb. (N. Y.) 144; *Wandle v. Turney*, 5 Duer (N. Y.) 661; *Taggart v. Rogers*, 49 Hun (N. Y.) 265; s. c. 17 N. Y. S. R. 646; *Elliot v. Patton*, 4 Yerg. (Tenn.) 10; *Dexter v. Arnold*, 1 Sumn. C. C. 109; *Anderson v. Stather*, 2 Coll. 209; *Holland v. Baker*, 3 Hare 68; *Throughton v. Binkes*, 6 Ves. 573; s. c. 5 Rev. Rep. 401.

<sup>4</sup> *Thomas v. Jones*, 84 Ala. 302; s. c. 4 So. Rep. 270; *Welch v. Stearns*, 69 Me. 192. See: *Ezzell v. Watson*, 83 Ala. 120; s. c. 3 So. Rep. 309; *Downs v. Hopkins*, 65 Ala. 598; *Hudson v. Kelly*, 78 Ala. 393.

signee,<sup>1</sup> his administrator or executor,<sup>2</sup> his heirs,<sup>3</sup> his wife,<sup>4</sup> his widow,<sup>5</sup> or a subsequent mortgagee.<sup>6</sup> All the owners of the equity of redemption must be made parties to the bill in equity to redeem the mortgage, or the same will be dismissed.<sup>7</sup> But a mortgagor who has parted absolutely with all his interest in the property is not a necessary party to a bill by his grantee to set aside a sale under a power in the

<sup>1</sup> *Farnum v. Metcalf*, 62 Mass. (8 Cush.) 46; *Saunders v. Frost*, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394. See: *Commercial Real Estate & Bldg. Assoc. v. Parker*, 84 Ala. 298; s. c. 4 So. Rep. 268.

In a case where A gave a mortgage to B, which was assigned by B to C to secure a debt, upon condition that if B should pay the debt the assignment would be determined and become void, and the assigned premises should revert in B. The court held that a purchaser of both A's and B's interests in the premises might maintain a bill in equity against C to redeem the mortgage, upon paying the amount due from B to C. *Farnum v. Metcalf*, 62 Mass. (8 Cush.) 46.

Neither the assignee of the equity of redemption, nor the assignee of the statutory right of redemption, is a proper party complainant to a bill by a mortgagor to redeem after sale; and a bill in which such persons are complainants is demurrable for misjoinder of parties. *Commercial Real Estate & Bldg. Asso. v. Parker*, 84 Ala. 298; s. c. 4 So. Rep. 268.

<sup>2</sup> *Wood v. Holland*, 57 Ark. 198; s. c. 21 S. W. Rep. 223; *Lilly v. Dunn*, 96 Ind. 220. See: *Harwood v. Underwood*, 28 Mich. 427.

The personal representative of one of the mortgagees who is dead is a necessary party in a bill to redeem from the mortgage. *Wood v. Holland*, 57 Ark. 198; s. c. 21 S. W. Rep. 223.

Same—The mere levy of an execution upon land to which the judgment debtor never had any title, and in which he never held any leviable interest, does not constitute any lien or charge thereupon, or invest the execution creditor with any right or title, on which to found an action for the redemption of a mortgage upon the same. *Harwood v. Underwood*, 28 Mich. 427.

<sup>3</sup> *Lilly v. Dunn*, 96 Ind. 220.

<sup>4</sup> *Taggart v. Rogers*, 49 Hun (N.Y.) 265; s. c. 17 N. Y. S. R. 646.

<sup>5</sup> *Butts v. Broughton*, 72 Ala. 294; *Lilly v. Dunn*, 96 Ind. 220.

<sup>6</sup> *Wilson v. Hayes*, 40 Minn. 531; s. c. 42 N. W. Rep. 467; 4 L. R. A. 196; 40 Alb. L. J. 8.

Thus it has been said that where a mortgagee sells the note, but executes no assignment of the mortgage securing the same, and subsequently repurchases the same, the equitable transfers of the beneficial interest in the mortgage effected by the sale and repurchase of the debt are not "assignments," within the meaning of Minn. Gen. Stat. 1878, c. 81, § 14, which the mortgagee is required to produce to the person or officer from whom he proposes to redeem. *Wilson v. Hayes*, 40 Minn. 531; s. c. 42 N. W. Rep. 467; 4 L. R. A. 196; 40 Alb. L. J. 8.

<sup>7</sup> *Welch v. Stearns*, 69 Me. 192.

Joinder of mortgagees in a bill to redeem.—In a case where F

mortgage, at which the mortgagee became the purchaser, and to redeem.<sup>1</sup>

The wife of the mortgagor, who executed the mortgage with her husband, but who was not made a party to the foreclosure action, can maintain an action during the lifetime of her husband to redeem the mortgaged premises from the sale;<sup>2</sup> and after his death she is properly joined with the heirs in a bill to redeem.<sup>3</sup> And it is said that in a suit to redeem a senior mortgage, the administrator, widow and heirs of a deceased mortgagee may join as plaintiffs.<sup>4</sup>

§ 1093. **Same—Parties defendant.**—The general rule is that all persons who will be affected adversely by the decree,<sup>5</sup> and those only, should be made parties defendant on a bill to redeem.<sup>6</sup> Where there are no outstanding in-

was first mortgagee, C was second mortgagee, and C, S and W were third mortgagees, and C assigned to F the second and all his interest in the third mortgage, it was held that S and W could maintain an action to redeem without joining C as a party plaintiff, and that they could have done so, even if C had not assigned, for as to the second mortgage his interest was adverse to theirs. It was also held that redemption could be made from F, by tendering him the amount of the first and second mortgages. *Saunders v. Frost*, 22 Mass. (5 Pick.) 259; s. c. 16 Am. Dec. 394.

<sup>1</sup> *Thomas v. Jones*, 84 Ala. 302; s. c. 4 So. Rep. 270.

<sup>2</sup> *Taggart v. Rogers*, 49 Hun (N. Y.) 265; s. c. 17 N. Y. S. R. 646.

<sup>3</sup> *Butts v. Broughton*, 72 Ala. 294.

<sup>4</sup> *Lilly v. Dunn*, 96 Ind. 220.

<sup>5</sup> Except where mortgagee purposely complicates the case and embarrasses the parties seeking to redeem, by numerous conveyances. *Davis v. Duffie*, 18 Abb. (N. Y.) Pr. 360, 365; *Yates v. Hornby*, 2 Atk. 237. See: *Dias v. Merle*, 4 Paige

Ch. (N. Y.) 259; *Parlmer v. Carlisle*, 1 Sim. & S. 423.

<sup>6</sup> See: *Jones v. Richardson*, 85 Ala. 463; s. c. 5 So. Rep. 194; *Hudson v. Kelly*, 70 Ala. 393; *Lehman v. Collins*, 69 Ala. 127; *Woodward v. Wood*, 19 Ala. 213; *Doe v. McLoskey*, 1 Ala. 708; *Essley v. Sloan*, 16 Ill. App. 63; *Millett v. Blake*, 81 Me. 531; s. c. 18 Atl. Rep. 293; *Linnell v. Layford*, 72 Me. 280; *Rowell v. Jewett*, 69 Me. 293; *Kennebec & P.R. Co. v. Portland & K. R. Co.*, 54 Me. 173; *Brown v. Johnson*, 53 Me. 246; *Beals v. Cobb*, 51 Me. 348; *Haskins v. Hawkes*, 108 Mass. 379; *Stillwell v. Hamm*, 97 Mo. 579; *Copeland v. Yoakum's Adm'r.* 38 Mo. 349; *Riley v. McCord*, 21 Mo. 285; *Loney v. Court-nay*, 24 Neb. 580; s. c. 39 N. W. Rep. 611; *Davis v. Duffie*, 18 Abb. (N. Y.) Pr. 365; *Johnson v. Golden*, 31 N. Y. S. R. 410; s. c. 9 N. Y. Supp. 739; *Winslow v. Clark*, 2 Lans. (N. Y.) 381; *Dias v. Merle*, 4 Paige Ch. (N. Y.) 257; *Yelverton v. Seldon*, 2 Sandf. (N. Y.) 481; *Childs v. Childs*, 10 Ohio St. 344; s. c. 75 Am. Dec. 512; *Youman v. Elmira & W. R. Co.*,

terests except those of the mortgagee, he is the only proper party; but if he is only a trustee for another, his *cestui que trust* must be made a party;<sup>1</sup> if he has sold his mortgage his grantees are necessary parties.<sup>2</sup> Anyone apparently having an equitable interest in the premises, liable to be affected by the decree for redemption, should be made a party.<sup>3</sup>

Where the property has been sold under a foreclosure sale, and the state statute requires that redemption must be made from the purchaser or those claiming under him, yet if the purchaser subsequently alienates the land, the mortgagor or judgement creditor seeking to redeem must have sufficient notice to put him on inquiry that the purchaser has aliened the land and who has the title before he can be required to make tender to the alienee.<sup>4</sup> And it has been said that where the purchaser of premises at foreclosure sale, in an action to which the owner of the equity of redemption was not made a party, mortgages the same premises, which, on foreclosure sale under the latter mortgage are purchased by another than the mortgagee, such mortgagee having parted with all interest in the premises, is not a proper party to an action to redeem, and does not

65 Pa. St. 278; Chaddick v. Cook, 32 Beav. 70; s. c. 9 Jur. N. S. 454; Norris v. Marshall, 5 Madd. 475; Wetherell v. Collins, 3 Madd. 255; Hobart v. Abbott, 2 Pr. Wms. 643.

When a mortgage on lands, or a deed absolute in form, though in fact a mortgage, is given for the indemnity of a surety, and a purchaser from the mortgagor seeks to redeem, the debt not being satisfied, the creditor is a necessary party to the bill. Hudson v. Kelly, 70 Ala. 393.

In railway mortgages, all who have been so connected with the mortgages as to render them liable for income under them, should be made parties defendant. Kennebec & P.R.

Co. v. Portland & K. R. Co., 54 Me. 173.

<sup>1</sup> See: Woodward v. Wood, 19 Ala. 213; Wetherell v. Collins, 3 Madd. 255.

<sup>2</sup> Davis v. Duffie, 18 Abb. (N. Y.) Pr. 360.

<sup>3</sup> Rowell v. Jewett, 69 Me. 293. See: Millett v. Blake 81 Me. 351; s. c. 18 Atl. Rep. 293.

An assignee of a mortgage, although he has no interest in it at the time of an attachment of the equity of redemption, is a proper party to a bill to redeem, no tender to him or demand for account is necessary. Millett v. Blake, 81 Me. 531; s. c. 18 Atl. Rep. 293.

<sup>4</sup> Leiman v. Collins, 69 Ala. 127.



become such by an allegation that she is collecting rents, where she does not claim to be a mortgagee in possession.<sup>1</sup>

The supreme court of Nebraska, in the case of *Loney v. Courtney*,<sup>2</sup> say that the fact that the defendants in an action in equity to redeem from a void mortgage foreclosure are donees of the mortgage, if they are in fact the owners thereof, will not bar their right to recover from the mortgagor what is equitably due.

In those states where the mortgage does not carry the present title to the land, on the death of the mortgagee his personal representative is the only necessary party;<sup>3</sup> but in all those jurisdictions in which the common law theory of mortgages prevail, it is thought the heir-at-law, legatee, devisee and other person in whom the estate is vested is a necessary party to the action.<sup>4</sup>

§ 1094. The decree—Generally.—The redemption of a mortgage will not be decreed on any terms other than the payment of the mortgagee's claim and costs;<sup>5</sup> and the decree, where the plaintiff prevails, usually requires this to be done by a day named, in default to be perpetually foreclosed, and the bill be dismissed with costs.<sup>6</sup> In those

<sup>1</sup> *Johnson v. Golder*, 31 N. Y. S. R. 410; s. c. 9 N. Y. Supp. 739.

<sup>2</sup> 24 Neb. 580; s. c. 39 N. W. Rep. 611.

<sup>3</sup> *Copeland v. Yoakum's Adm.*, 38 Mo. 349.

<sup>4</sup> See: *Jones v. Richardson*, 85 Ala. 463; s. c. 5 So. Rep. 194; *Haskins v. Hawkes*, 108 Mass. 379; *Copeland v. Yoakum's Adm.*, 38 Mo. 349; *Riley's Adm. v. McCord's Adm.*, 21 Mo. 283; *Osbourn v. Fallows*, 1 Russ. & M. 741.

In *Haskins v. Hawkes*, *supra*, the court say: "The children and heirs of the Hawkes, who are made defendants in the bill, entered the mortgaged premises to foreclose, and took the rents and profits. But they were mistaken in supposing they had such a title as

would enable them to foreclose," citing *Palmer v. Stevens*, 65 Mass. (11 Cush.) 147; *Foy v. Cheney*, 31 Mass. (14 Pick.) 404; *Smith v. Dyer*, 16 Mass. 18.

<sup>5</sup> *Cowles v. Marble*, 37 Mich. 158.

<sup>6</sup> *Segrest v. Segrest's Heirs*, 38 Ala. 674; *Bremer v. Calumet Canal Co.*, 127 Ill. 464; *Pitman v. Thornton*, 66 Me. 469; *Cowles v. Marble*, 37 Mich. 158; *Hazard v. Robinson*, 15 R. I. 226; s. c. 2 Atl. Rep. 433; 1 N. Eng. Rep. 882; *Gage v. Porter*, 64 N. H. 619; s. c. 15 Atl. Rep. 147; 6 N. Eng. Rep. 906.

A decision giving a complainant leave to redeem on the payment of the mortgage debt is a determination in his favor, where no other relief is sought. (*Gage v. Porter* 64 N. H. 619; s. c. 15 Atl. Rep. 147; 6 N.

cases where it is found that nothing is due the mortgagee, the decree will be for the possession of the mortgaged premises, and awarding a writ of possession.<sup>1</sup> In Michigan, on a bill to redeem, the decree should provide that if the redemption money is not paid in accordance with the decree, the remedy will be by sale as on foreclosure, and not by strict foreclosure.<sup>2</sup>

In those cases where it is sought to redeem from an irregular or invalid foreclosure sale, it is thought that the decree should not provide redemption from a void sale, but from an unforced security.<sup>3</sup>

It is thought that a decree of redemption from a foreclosure sale under a power in a mortgage, providing that if the amount required to be paid by way of redemption is not paid within the time named the mortgage shall stand foreclosed, is not on its face erroneous because it does not provide for a sale on failure to redeem, in those cases where plaintiffs do not ask for a sale or a modification of the decree.<sup>4</sup> But where a judgment is entered, fixing the

Eng. Rep. 906), and is a final decree. *Hazard v. Robinson*, 15 R. I. 226; s. c. 2 Atl. Rep. 433; 1 N. E. Eng. Rep. 882.

Where a mortgagor asks for an injunction, prays for an account, and offers to pay whatever shall be found due, a decree may be rendered in defendant's favor without a cross-bill. *Polk v. Mitchell*, 85 Tenn. 634.

Where a cross-bill prays to be allowed to redeem from a foreclosure, a decree directing the payment of a certain sum to redeem should not direct a conveyance, by the party, and, in default thereof, by a master in chancery, but should conclude that, in default of paying the amount required, the cross-bill should be dismissed. *Bremer v. Calumet & C. Canal & D. Co.*, 127 Ill. 464; s. c. 18 N. E. Rep. 321.

<sup>1</sup> *Gerrish v. Block*, 122 Mass. 76.

<sup>2</sup> *Meigs v. McFarlan*, 72 Mich. 194; s. c. 40 N. W. Rep. 246.

<sup>3</sup> *Grover v. Fox*, 36 Mich. 461.

<sup>4</sup> *Martin v. Ratcliff*, 101 Mo. 254; s. c. 13 S. W. Rep. 1051.

The supreme court of Indiana say that where, in the special finding in proceedings to redeem, it is not stated that the principal, interest, and costs of the judgment were paid, or that the principal and interest of the mortgage were paid, the inference is that the redemption was not from the decree, but from the mortgage. Where the plaintiffs were not bound by the decree, they had a right to redeem from the mortgage, irrespective of the decree. The amount they were bound to pay to entitle them to redeem depended upon the covenants of the mortgage, and the rights of the mortgagee in possession under the mortgage. The rights of the parties,

amount due, and providing that either party may apply to the court for further directions, an application for a reference to ascertain the value of the use of the premises will be denied.<sup>1</sup>

§ 1095. Same—Time of redemption after decree.—The time within which a redemption may be made where the plaintiff prevails, is in the discretion of the court, in the absence of a controlling statute, and is usually regulated by the circumstances of each particular case;<sup>2</sup> but it is usually six months,<sup>3</sup> or a year.<sup>4</sup> One who procures a decree allowing

both the mortgagee and the redemptioners, must be determined from the mortgage, and not from the decree. *Johnson v. Hosford*, 110 Ind. 572; s. c. 10 N. E. Rep. 407; 8 West. Rep. 43.

<sup>1</sup> *Hollingsworth v. Campbell*, 28 Minn. 8.

A conditional judgment, rendered on a writ of entry brought by a mortgagee against the mortgagor in possession, is not conclusive as to the amount then due against a purchaser of the equity of redemption before the bringing of the writ, on a bill in equity by him to redeem. Nor is such purchaser concluded as to the amount due by the fact that he was made a party to a foreclosure proceeding in another state, the mortgage covering land there as well as in the state wherein the purchaser seeks to redeem, and in that proceeding, the value of the land in that state having been determined. *Dooley v. Potter*, 140 Mass. 49.

<sup>2</sup> *Bremer v. Callumet & C. Canal & Dock Co.*, 127 Ill. 464; s. c. 18 N. E. Rep. 321; *Decker v. Patton*, 20 Ill. App. 210, aff'd. 120 Ill. 464; s. c. 11 N. E. Rep. 897; 9 West. Rep. 501; *Dennett v. Cadman*, 158 Mass. 371; s. c. 33 N. E. Rep. 574; *Mills v. Stehle*, 22 Neb. 740; s. c. 36 N. W. Rep. 142; *Murphy v. New Hamp-*

shire Sav. Bank, 63 N. H. 362; *Clark v. Reyburn*, 75 U. S. (8 Wall.) 318, 324; bk. 19 L. ed. 354, 356.

In an action by a first mortgagee who has foreclosed and purchased a decree to compel a junior mortgagee to redeem, is not void for failure to provide within what time he may redeem. *Evans v. Atkins*, 75 Iowa 448; s. c. 39 N. W. Rep. 702.

A decree in an ordinary bill to redeem in which no peculiar relief is prayed for, and where there has been no suggestion that the plaintiffs are not ready to perform the offer in the bill, properly requires them to redeem within a time stated, instead of allowing redemption at any time before a valid and effectual foreclosure of the mortgage by a new execution of the power of the sale therein, or otherwise. *Dennett v. Codman*, 158 Mass. 371, s. c. 33 N. E. Rep. 574.

<sup>3</sup> *Decker v. Patton*, 20 Ill. App. 210, aff'd. 120 Ill. 464; s. c. 11 N. E. Rep. 897; 9 West. Rep. 501; *Hollingsworth v. Koon*, 117 Ill. 511; s. c. 6 N. E. Rep. 148; 8 *Id.* 193; *Perrine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Waller v. Harris*, 7 Paige Ch. (N. Y.) 167; *Dunham v. Jackson*, 6 Wend. (N. Y.) 22.

<sup>4</sup> *Murphy v. New Hampshire Sav. Bk.*, 63 N. H. 362; s. c. 1 N. Eng.

him to redeem within a specified time on the happening of a certain contingency is bound by the decree. He cannot, six years afterwards, seek to avoid it.<sup>1</sup> But it is said that where on a bill to redeem, a decree is rendered fixing the amount and time of payment, the fact that the mortgagor fails to make such payment does not make the foreclosure absolute without any further order, so as to bar the right to redeem; and if the mortgagee thereafter receives rents from the tenants in possession, no further proceedings can be had until there has been a new accounting and a new order fixing the amount and time of payment.<sup>2</sup>

§ 1096. Same—Same—Extension.—Upon a bill to redeem, judgment in favor of plaintiff and a decree that the mortgage debt and costs shall be paid and redemption made within a specified time, the time stated in the decree will not be extended so as to permit a redemption to be made after the time fixed has elapsed.<sup>3</sup> Thus, in a case

Rep. 770. See: *Hollingsworth v. Campbell*, 28 Minn. 18; s. c. 8 N. W. Rep. 873.

The provision of Minn. Gen. St. 1878, c. 81, § 43, that "in case of strict foreclosure, no final decree of foreclosure shall be rendered until the lapse of one year after the judgment adjudging the amount due on such mortgage," applies to a judgment in an action to redeem, so that it is erroneous if it limits the time for redemption to a period less than one year from the judgment. *Hollingsworth v. Campbell*, 28 Minn. 18; s. c. 8 N. W. Rep. 873.

<sup>1</sup> *Kolle v. Clausheide*, 99 Ind. 97.

<sup>2</sup> *Tetrault v. Labbe*, 155 Mass. 497; s. c. 30 N. E. Rep. 173.

<sup>3</sup> *Segrest v. Segrest's Heirs*, 38 Ala. 674.

The earliest decision upon the question whether the chancellor will allow an extension of the

time prescribed in his decree for the payment of the mortgage debt, is that of Lord Eldon in *Novosietski v. Wakefield*, 17 Ves. 417. In that case the lord chancellor distinguished between suits in foreclosure and suits to redeem; and while he concedes that the practice is to extend the time in the former case, he denies that there is any precedent for the extension in the latter, and refuses to begin such a practice. The reason given for the decision is, that the mortgagor's attitude in the case is altogether different. In the foreclosure suit the proceeding is against him, to compel the payment of the debt, or effect a forfeiture of his estate. While, in a redemption suit, "he comes into court saying, 'here is the money, give me my estate.'" Lord Eldon's decision is followed in *Falkner v. Bolton*, 7 Sim. 319. See: *Perrine v. Dunn*, 4 John. Ch. (N. Y.,) 140; *Brinckerhoff v. Lansing*, 4 John.

where, upon a bill to redeem, a decree was rendered, requiring the complainant to pay into court by a day certain the amount reported to be due on the mortgage debt, and ordering his bill to be dismissed on his failure to make the payment within the prescribed time, the court held that there was no error in refusing to extend the time and in dismissing the bill after default, as the case was not shown to be one of fraud, accident, or mistake, unmixed with negligence on the part of the complainant himself.<sup>1</sup>

An extension of time, however, is in the sound discretion of the court, and will usually be granted where the failure to pay at the designated time was occasioned by fraud, accident, or mistake, or to enable contribution to the redemption fund to be made,<sup>2</sup> but not where the plaintiff's negligence has contributed to such failure.<sup>3</sup>

§ 1097. Same—Where sold in parcels.—In the case of *Smith v. Buse*,<sup>4</sup> the mortgage covered a great many separate parcels of land, which, at the foreclosure, were sold separately to various persons, and a mortgagor brought an action against the purchasers to have the sale adjudged void and for leave to redeem from the mortgage, and judgment in that action was rendered in favor of the defendant, the court held, on appeal, that this was not *res adjudicata* upon the claim of any purchaser to have acquired the title to any particular lot of the mortgaged premises.

Ch. (N. Y.) 65; *Waller v. Harris*, 7 Paige Ch. (N. Y.) 167; *Smith v. Bailey*, 10 Vt. 163; *Turner v. Turner*, 3 Murp. (Va.) 66.

<sup>1</sup> *Segrest v. Segrest's Heirs*, 38 Ala. 674.

<sup>2</sup> See: *Ante*, §§ 1067-1071.

<sup>3</sup> *Segrest v. Segrest's Heirs*, 38 Ala. 674. See: *Emmons v. Vauzle*, 78 Mich. 171; *Cilley v. Huse*, 40 N. H. 362; *Brinckerhoff v. Lansing*, 4 John. Ch. (N. Y.) 65; s.c. 5 Am. Dec. 538; *Kopper v. Dyer*, 39 Vt. 477; s. c. 59

Am. Dec. 742. See: *Kolle v. Clausheide*, 99 Ind. 100; *Perrine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Brinckerhoff v. Lansing*, 4 John. Ch. (N. Y.) 65 s. c. 8 Am. Dec. 538; *Chicago D. & V. R. Co. v. Fosdick*, 106 U. S. 47; bk. 27 L. ed. 47; s. c. 1 Supt. Ct. Rep. 10; *Jenkins v. Eldridge*, 1 Woodb. & M. C. C. 61; *Monkhonse v. Bedford*, 1 Madd. 382.

<sup>4</sup> 35 Minn. 234; s. c. 28 N.W. Rep. 220.



§ 1098. **Same—On bill by widow.**—We have already seen that the wife or widow may maintain a bill to redeem.<sup>1</sup> It is said that in an action by a widow to redeem from a foreclosure of a mortgage given by her husband alone for the purchase price of land, and foreclosed in his lifetime, without her being made a party, if anything is found due on the mortgage, a decree should be rendered for the sale of the two-thirds of the land held by the defendant, and, in case of a failure to realize a sum sufficient to pay the same, then for the sale of the plaintiff's one-third.<sup>2</sup>

§ 1099. **Same—Sale not decreed.**—It is thought that in the absence of any circumstances taking the case out of the ordinary rule, the complainant in a bill to redeem will not be granted a decree of sale as in a foreclosure, subject to the statutory right of redemption.<sup>3</sup>

§ 1100. **Same—Accounting for Value.**—In those cases where the mortgaged property has been sold or used by the mortgagee, or its condition changed so that it cannot be restored to the mortgagor, the only relief available to the latter in an action to redeem is to have an accounting and be allowed the value of the property when taken from him.<sup>4</sup> In the case of *Adams v. Sayre*,<sup>5</sup> on a bill by a mortgagor to redeem on the ground that the purchaser bought by collusion with the mortgagee, or in the alternative, that he was plaintiff's agent and could not purchase for himself, the chancellor decreed relief without stating under which aspect of the bill, and ordered the register to state an account. On affirmance of this decree under the second aspect, the court held that the chancellor might modify his instructions to the register as to the principles on which the account should be stated.<sup>6</sup>

§ 1101. **Same—Appeal and new trial.**—It has been said the right to appeal from a decree of the circuit court

<sup>1</sup> See: *Ante*, §§ 993, 994.

<sup>2</sup> *Barr v. Van Alstine*, 120 Ill. 590; s. c. 22 N. E. Rep. 965.

<sup>3</sup> *Decker v. Patton*, 20 Ill. App. 210; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470; s. c. 25 Am. Dec. 729.

<sup>4</sup> *Mowry v. First Nat. Bk. Baraboo*,

54 Wis. 38; s. c. 11 N.W. Rep. 247.

<sup>5</sup> 76 Ala. 509.

<sup>6</sup> *Adams v. Sayre*, 76 Ala. 509.

in foreclosure, which wrongfully denied the right to redeem, is absolute and does not depend upon any offer to redeem within the time allowed therefore by statute.<sup>1</sup> The supreme court of Indiana say that in a suit to redeem and procure the cancellation of a mortgage, although the complaint prays for the quieting of title, a new trial as of right cannot be had.<sup>2</sup> The rule is well settled that a reviewing court will not reverse a decree in chancery for an immaterial departure from the technical rules, when it can see that no harm has resulted to the appellant.<sup>3</sup>

§ 1102. *Costs on redemption.*—The general rule is that in an action to redeem the costs must be paid by the plaintiff, even where he prevails;<sup>4</sup> but they may be imposed upon the defendant if he unreasonably refuses to receive the money when it is tendered to him,<sup>5</sup> or sets up an unconsciable or frivolous defense causing unnecessary delay and expense.<sup>6</sup> In those cases where both parties are equally at fault a court of equity will divide the costs.<sup>7</sup> In the case of *Hall v. Gardner*,<sup>8</sup> it is said that where a

<sup>1</sup> *Mason v. Northwestern Mut. L. Ins. Co.*, 106 U. S. 163, bk. 27; L. ed. 129.

<sup>2</sup> *Voss v. Eller*, 109 Ind. 260; s. c. 10 N. E. Rep. 74; 7 West. Rep. 361.

<sup>3</sup> *Allis v. Ins. Co.*, 197 U.S. 144.

<sup>4</sup> *Lamb v. Jaffrey*, 47 Mich. 128; s. c. 10 N.W. Rep. 65. See: *Blum v. Mitchell*, 59 Ala. 535; *Harper v. Ely*, 70 Ill. 581; *Hosford v. Johnson*, 74 Ind. 479; *Hall v. Gardner*, 71 Me. 233; *Turner v. Johnson*, 95 Mo. 431; *Bean v. Brackett*, 35 N. H. 88; *Forman v. Bulson*, 30 N. J. Eq. (3 Stew.) 493; *Phillips v. Hulsizer*, 20 N. J. Eq. (5 C. E. Gr.) 308; *Gage v. Brewster*, 31 N. Y. 218; *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 526; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Brockway v. Wells*, 1 Paige Ch. (N. Y.) 617; *Slee v. Manhattan Co.* 1 Paige Ch. (N. Y.) 48;

*Moore v. Cord*, 14 Wis. 213; *Wetherell v. Collins*, 3 Madd. 255.

<sup>5</sup> *Meigs v. McFarlan*, 72 Mich. 194; s. c. 40 N. W. Rep. 246; *Lamb v. Jaffrey*, 47 Mich. 28; s. c. 10 N. W. Rep. 65; *King v. Duntz*, 11 Barb. (N. Y.) 191; *Van Buren v. Olmstead*, 5 Paige Ch. (N. Y.) 9; *Harmer v. Priestly*, 16 Beav. 569; *Grugeon v. Gerrard*, 4 Young & C. 128.

<sup>6</sup> *Turner v. Johnson*, 95 Mo. 431; *Davis v. Duffie*, 18 Abb. (N. Y.) Pr. 360; *Seeley v. Manhattan Co.* 1 Paige Ch. (N. Y.) 81; *Brockway v. Wells*, 1 Paige Ch. (N. Y.) 618; *Barton v. May*, 3 Sandf. Ch. (N. Y.) 450; *Still v. Buzzell*, 60 Vt. 478.

<sup>7</sup> *Perdue v. Brooks*, 85 Ala. 459; s. c. 5 So. Rep. 126; *Hollingsworth v. Koon*, 117 Ill. 511; s. c. 6 N. E. Rep. 148; 8 Id. 193.

<sup>8</sup> 71 Me. 233.

mortgagee, upon a request in writing, from the mortgagor, for an account in writing of the amount due on the mortgage, renders an account which is imperfect and inaccurate, he will be liable to costs on a bill in equity to redeem, if the mortgage is redeemed within the time named in the decree of the court.

The court of chancery of New Jersey, in the case of *Forman v. Bulson*,<sup>1</sup> say the fact that the evidence to prove defeasable a deed absolute on its face is very conflicting, and that the conclusion that it was merely a mortgage was reached only by the preponderance of the evidence, is a good reason for adhering to the general rule that the mortgagee is entitled to his costs on a bill to redeem.

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<sup>1</sup> 30 N. J. Eq. (3 Stew.) 493.

## CHAPTER XLVI.

### REDEMPTION—BAR OF RIGHT OF.

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|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>§ 1103. By foreclosure.</p> <p>1104. By judgment.</p> <p>1105. By estoppel.</p> <p>1106. By lapse of time.</p> <p>1107. By laches.</p> <p>1108. By Statute of limitations.</p> <p>1109. Same—When statute begins to run.</p> | <p>§ 1110. Same—Disability.</p> <p>1111. By adverse possession.</p> <p>1112. By purchase by mortgagee.</p> <p>1113. Tender does not revive.</p> <p>1114. Waiver.</p> <p>1115. Same—By acknowledgment.</p> |
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§ 1103. By foreclosure.—We have already seen<sup>1</sup> that the right of redemption of mortgaged property may be effectually extinguished and barred by a valid foreclosure, to which all the persons having or claiming to have an interest in the mortgaged premises have been made parties; we have also seen<sup>2</sup> that persons in interest who are not made parties to the foreclosure proceedings are not affected thereby, and for that reason are entitled to redeem therefrom.<sup>3</sup> Thus the supreme court of Ohio, in the case of *Endel v. Leibrock*,<sup>4</sup> say that to bar the equity of redemption of a non-resident mortgagor, upon whom service of summons cannot be personally made, must be constructively served as required by the Code,<sup>5</sup> and a judgment of foreclosure sale without such service will not be a bar to an action to redeem.

<sup>1</sup> See: *Ante*, § 915.

<sup>2</sup> See: *Ante*, § 971.

<sup>3</sup> *Wiley v. Ewing*, 47 Ala. 418; *Hodgen v. Guttery*, 58 Ill. 431; *Strang v. Allen*, 44 Ill. 428; *Smith v. Sinclair*, 10 Ill. 108; *Nesbit v. Hanway*, 87 Ind. 400; *Murdock v. Ford*, 17 Ind. 52; *Bunce v. West*, 62 Iowa 80; s. c. 17 N. W. Rep. 179; *Ayers v. Adair County*, 61 Iowa 728; s. c. 17 N. W. Rep. 161; *American Buttonhole, etc., Co. v. Burlington Mut. Loan Assoc.* 61 Iowa 464; s. c. 16 (1896)

N. W. Rep. 527; *Wright v. Howell*, 35 Iowa 290; *Gower v. Winchester*, 33 Iowa 301; *Anson v. Anson*, 20 Iowa 55; *Johnson v. Harman*, 19 Iowa 56; *Bates v. Ruddick*, 2 Iowa 423; s. c. 65 Am. Dec. 774; *Miner v. Beekman*, 50 N. Y. 337; *Sellwood v. Gray*, 11 Oreg. 534; s. c. 5 Pac. Rep. 196; *Pratt v. Frear*, 13 Wis. 462; *Murphy v. Farwell*, 9 Wis. 102; s. c. 2 Wis. 533.

<sup>4</sup> 33 Ohio St. 254.

<sup>5</sup> Ohio Code, § 72.

§ 1104. **By judgment.**—A bill to foreclose may be barred by a judgment of dismissal of a former suit for the same purpose, in those cases where the merits were inquired into on the former trial; but where the merits were not thus inquired into on the former trial the defendants cannot set up the former record as a bar to a subsequent action.<sup>1</sup> Where a bill to redeem has been dismissed on the merits, but without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same purpose;<sup>2</sup> but in those cases where a dismissal is qualified, it is not regarded as an adjudication on the merits of the subjects of the controversy, and is not a bar to the bringing of a second bill to redeem between the same parties.<sup>3</sup>

§ 1105. **By estoppel.**—We have already seen<sup>4</sup> that the mortgagor and those claiming under him, may be estopped by their own acts from exercising the right of redemption from a person who has purchased the land at foreclosure sale.<sup>5</sup> Thus it has been said that a subsequent mortgagee will be estopped to redeem the premises, as against a prior

<sup>1</sup> *Bostwick v. Abbott*, 16 Abb. (N. Y.) Pr. 419; s. c. 40 Barb. (N. Y.) 333; *Holmes v. Remsen*, 7 John. Ch. (N. Y.) 286; *Perine v. Dunn*, 4 John. Ch. (N. Y.) 140.

<sup>2</sup> *Perine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Badger v. Badger*, 1 Cliff. C. C. 246.

<sup>3</sup> *Perine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Burton v. Burton*, 58 Vt. 420; s. c. 5 Atl. Rep. 281; 2 N. Eng. Rep. 607. See: *Foote v. Gibbs*, 67 Mass. (1 Gray.) 412; *Bigelow v. Windsor*, 67 Mass. (1 Gray.) 301; *Sewall v. Eastern R. Co.*, 63 Mass. (9 Cush.) 5; *Gove v. Lyford*, 44 N. H. 525; *Mills v. Mills*, 18 N. J. Eq. (3 C. E. Gr.) 444; *Durrant v. Essex Co.*, 74 U. S. (7 Wall.) 107; bk 19 L. ed. 154; *Hughes v. United States*, 71 U. S. (4 Wall.) 232; bk. 18 L. ed. 303; *Walden v. Bodley*, 39

U. S. (14 Pet.) 156; bk 10 L. ed. 398; *Stevens v. Guppy*, 3 Russ. 171; *Lindsay v. Lynch*, 2 Sch. & L. 1; s. c. 9 Rev. Rep. 54; *Woolam v. Hearn*, 7 Ves. 211; s. c. 6 Rev. Rep. 113; *Townshend v. Stangroom*, 6 Ves. 328; s. c. 5 Rev. Rep. 312.

<sup>4</sup> See: *Ante*, § 921.

<sup>5</sup> *Fay v. Valentine*, 29 Mass. (12 Pick.) 40; s. c. 22 Am. Dec. 397; *Foster v. Briggs*, 3 Mass. 313; *Parkhurst v. Van Cortlandt*, 14 John. (N. Y.) 15; s. c. 7 Am. Dec. 427; 1 John. Ch. (N. Y.) 274; *Niven v. Belknap*, 2 John 273; *Wright v. Whitehead*, 14 Vt. 268; *Beckett v. Cordley*, 1 Bro. C. C. 357; *Northern Counties of England Fire Ins. Co. v. Whipp* (1884), 26 Ch. Div. 482, 488; s. c. 53 L. J. Ch. 629; *Taylor v. Russell* (1891), 1 Ch. 8; s. c. 60 L. J. Ch. 1; *Hanning v. Ferrers*, 1 Eq. Cas. Abbr. 357;



mortgagee's assignee, where such subsequent mortgagee was instrumental in inducing the purchasing, by an assurance that he would never redeem the mortgaged premises;<sup>1</sup> and we have heretofore seen that a party may be estopped by merely standing idly by and not disclosing his titles or rights when he should speak;<sup>2</sup> because in equity when a man fails to speak when he should, and others upon the strength of his silence have acquired rights, will be restrained from speaking when he would.<sup>3</sup>

§ 1106. By lapse of time.—It is well established that lapse of time may be a bar to the right to redeem from foreclosure; the statute of limitations<sup>4</sup> being applied by analogy. The time required to bar a right of redemption is, in the absence of any statutory provision, the common law period of twenty years;<sup>5</sup> but the act of the mortgagee,

Canton v. Canton, L. R. 1 Ch. 143, 147; s. c. L. R. 2 H. L. 127; Savage v. Foster, 9 Mod. 35; Mocatta v. Murgatroyd, 1 Pr. Wms. 494; Hawkins v. Homes, 1 Pr. Wms. 70; Peter v. Russell, 2 Vern. 726; Raw v. Pote, 2 Vern. 239; Hunsden v. Cheyney, 2 Vern. 148, 150; Hobbs v. Norton, 1 Vern. 136; Evans v. Bicknell, 6 Ves. 174, 190; s. c. 5 Rev. Rep. 245; Wellford v. Beezely, 1 Ves. Sr. 6; 1 Fonbl. Eq. 161.

<sup>1</sup> Fay v. Valentine, 29 Mass. (12 Pick.) 40; s. c. 22 Am. Dec. 397.

<sup>2</sup> *Ante*, § 921. See: Fay v. Valentine, 29 Mass. (12 Pick.) 40; s. c. 22 Am. Dec. 397; Foster v. Briggs, 3 Mass. 313; Parkhurst v. Van Cortland, 14 John. (N. Y.) 15; s. c. 7 Am. Dec. 427; 1 John. Ch. (N. Y.) 274; Niven v. Belknap, 2 John. (N. Y.) 273; Beckett v. Cordley, 1 Bro. C. C. 357; Hanning v. Ferrers, 1 Eq. Cas. Abbr. 357; Savage v. Foster, 9 Mod. 35; Mocatta v. Murgatroyd, 1 Pr. Wms. 494; Raw v. Pote, 2 Vern. 239; Hunsden v. Cheyney, 2 Vern. 148, 150; Hobbs v. Norton, 1 Vern. 136; Evans v. Bicknell,

6 Ves. 174, 190; s. c. 5 Rev. Rep. 245; Wellford v. Beezely, 1 Ves. Sr. 6; 1 Fonbl. Eq. 161.

<sup>3</sup> Niven v. Belknap, 2 John. (N. Y.) 589; Wright v. Whitehead, 14 Vt. 268.

<sup>4</sup> See: *Post*, § 1107.

<sup>5</sup> See: Coyle v. Wilkins, 57 Ala. 108; Byrd v. McDaniel, 33 Ala. 18; McArthur v. Carrie's Admr., 32 Ala. 75; s. c. 70 Am. Dec. 529; Gunn v. Brantley, 21 Ala. 633, 644; Maury v. Mason, 8 Port. (Ala.) 211; Guthrie v. Field, 21 Ark. 379; Taylor v. McClain, 60 Cal. 651; s. c. 64 *Id.* 513; Arrington v. Liscom, 34 Cal. 366; s. c. 94 Am. Dec. 722; Grattan v. Wiggins, 23 Cal. 16; Jarvis v. Woodruff, 22 Conn. 548; Bunce v. Wolcott, 2 Conn. 27; Davidson v. Lawrence, 49 Ga. 335; Morgan v. Morgan, 10 Ga. 297; Goodell v. Dewey, 100 Ill. 308; Locke v. Caldwell, 91 Ill. 419; Halesy v. Jackson, 66 Ill. 139; Lindsey v. Delano, 78 Iowa 350; s. c. 43 N. W. Rep. 218; Crawford v. Taylor, 42 Iowa 260; Montgomery v. Chadwick, 7 Iowa, 114; McPherson v.

or those claiming under him, must be unequivocal. He must not enter as the tenant of the mortgagor, and if he does that relation will be presumed to continue until the

Hayward, 81 Me. 329; s. c. 17 Atl. Rep. 164; Randall v. Bradley, 65 Me. 43; Roberst v. Littlefield, 48 Me. 61; Blethen v. Dwinal, 35 Me. 556; Crook v. Glenn, 30 Md. 55, 70; Hertle v. McDonald, 2 Md. Ch. 128; s. c. 3 Md. 366, Stevens v. Dedham Savings Inst., 129 Mass. 547; Ayres v. Waite, 64 Mass. (10 Cush.) 72; Hoffman v. Harrington, 33 Mich. 392; Reynolds v. Greening, 10 Mich. 355; Cook v. Finkler, 9 Mich. 131; Anding v. Davis, 33 Miss. 574; Cape Girardeau Company v. Harbison, 56 Mo. 96; Ford v. Wilson, 35 Mo. 490; s. c. 72 Am. Dec. 137; McNair v. Lot, 34 Mo. 285; s. c. 84 Am. Dec. 78; Tripp v. Marcy, 39 N. H. 439; Chapin v. Wright, 41 N. J. Eq. (14 Stew.) 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 59; Miner v. Beekman, 50 N. Y. 337; s. c. 14 Abb. (N. Y.) Pr. N. S. 1; Demarest v. Wynkoop, 3 John. Ch. (N. Y.) 129, 135; s. c. 8 Am. Dec. 467; Moore v. Cable, 1 John. Ch. (N. Y.) 385; Bailey v. Carter, 7 Ired. (N. C.) Eq. 282; Martin v. Jackson, 27 Pa. St. 504; s. c. 67 Am. Dec. 489; Wood v. Jones, 1 Meigs (Tenn.) 513; Yarbrough v. Newell, 10 Yerg. (Tenn.) 376; Hammond v. Hopkins, 3 Yerg. (Tenn.) 529; Ross v. Norvell, 1 Wash. (Va) 14; s. c. 1 Am. Dec. 422; Knowlton v. Walker, 13 Wis. 264; Brobst v. Brock, 77 U. S. (10 Wall.) 152; s. c. *sub nom* Doe ex. d. Brobst v. Roe, bk. 19 L. ed. 1002; Slicer v. Pittsburgh, 57 U. S. (16 How.) 571; bk. 14 L. ed. 1063; Elmendorf v. Taylor, 23 U. S. (10 Wheat.) 152; bk. 6 L. ed. 289; Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142; Fox v. Blossom, 17 Blatchf. C. C.

352; Amory v. Lawrence, 3 Cliff. C. C. 523; Dexter v. Arnold, 1 Sumn. C. C. 117; Doe v. DeVeber, 3 Allen (N. B.) 23; Anonymous, 3 Atk. 313; Blake v. Foster, 2 Ball & B. 402; Cholmondeley v. Clinton, 2 Jack & W. 187; Chapman v. Corpse, 41 L. T. N. S. 22; Barron v. Martin, 19 Ves. 327.

**Actual possession for twenty years** by mortgagee, or adverse possession by a stranger to the mortgage, without account or acknowledgment of any subsisting mortgage, bars the equity of redemption of the mortgagor by operation of the statute of limitations. McNair v. Lot, 34 Mo. 285; s. c. 84 Am. Dec. 78.

**Under New Jersey Rev. Stat. § 597**, twenty years' possession of premises by the mortgagee, after default of payment, bars the equity of redemption; and such bar is not subject to be waived by an incautious admission of the mortgagee. Chapin v. Wright, 41 N. J. Eq. (13 Stew.) 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 59.

**After a lapse of sixteen years** from the time of a sale under a bar, known to the mortgagor or his heirs, who has remained all this time passive cannot redeem, say the court in the case of Bergen v. Bennett, 1 Cal. Cas. (N. Y.) 1; s. c. 2 Am. Dec. 281. See: Watson v. Mulford, 21 N. J. L. (1 Zab.) 507; Ten Eyck v. Craig, 62 N. Y. 419.

**Four years** elapsing from the time when the right of action accrues on the mortgage debt is sufficient to bar the right of the mortgagor to maintain an action to redeem the property from the mortgage lien under the California statute. Cunningham v.

presumption is rebutted.<sup>1</sup> No lapse of time will serve to bar the right of redemption in those cases where the mortgage has been treated by the parties as a subsisting lien, and a security for the debt only;<sup>2</sup> should the mortgagee take possession, however, and retain the same without accounting for the rents and profits for the space of twenty years, the equity of redemption will be presumed to be extinguished, or abandoned by the mortgagor; and a bill to redeem will not be entertained by a court of equity.<sup>3</sup>

§ 1107. By laches.—The right of a party to redeem from a mortgage foreclosure sale under advertisement, or otherwise, may be defeated by laches.<sup>4</sup> Thus, where a

Hawkins, 24 Cal. 413; s. c. 85 Am. Dec. 73. See: Arrington v. Liscom, 34 Cal. 469; Millard v. Hathaway, 27 Cal. 146.

In the case of *Stevens v. Dedham Sav. Inst.*, 129 Mass. 547, the holder of a mortgage of land assigned it as security for his own promissory note. After a breach of the condition of the mortgage and of the assignment, the assignee brought an action to foreclose, obtained a conditional judgment for the amount due from the assignor, and on an execution obtained seisin and possession of the land. After retaining possession for three years he sold the land. The court held that a bill by the assignor to redeem, brought within twenty years from such sale, but more than twenty years after possession was obtained, could not be maintained.

In the case of *Goodell v. Dewey*, 100 Ill. 308, a mortgagor and his wife conveyed the mortgaged premises absolutely to the mortgagee in full satisfaction of the indebtedness. The mortgagee to cut off certain intervening liens, sold under the power, immediately taking back a conveyance from the ostensible purchaser at the sale.

The mortgagee surrendered notes and mortgage, and held possession for three years, the premises being worth but little more than the amount of the mortgage. During this time the mortgagor made no objection, and there was no evidence of fraud or overreaching. The court held that the mortgagor could not maintain a suit to redeem.

<sup>1</sup> *Ayers v. Waite*, 64 Mass (10 Cush.) 72; *Shields v. Lozeur*, 34 N. J. L. (5 Vr.) 496; *Anderson v. Lanterman*, 27 Ohio St. 104; *Steadman v. Gassett*, 18 Vt. 346; *Edwards v. Wray*, 12 Fed. Rep. 42; *Landers v. Sanders*, L. R. 19 Ch. Div. 373; s. c. 44 L. T. N. S. 171; *Clowes v. Hughes* L. R. 5 Exch. 160; *Ord v. Heming*, 1 Vern. 418.

<sup>2</sup> *Dexter v. Arnold*, 1 Sumn. C. C. 117.

<sup>3</sup> *Id.*

<sup>4</sup> *Bancroft v. Swain*, 143 Mass. 144; s. c. 9 N. E. Rep. 539; 3 N. Eng. Rep. 309; *Emmons v. Van Zee*, 78 Mich. 171; s. c. 43 N. W. Rep. 1100; *Hall v. Westcott*, 17 R. I. 504; s. c. 23 Atl. Rep. 25; 2 N. Eng. Rep. 887; *Francis v. Parks*, 55 Vt. 80.

person bringing a bill to redeem delays to prosecute the same for a period of more than two years after its commencement, he will be debarred by such delay from the right to redeem;<sup>1</sup> and it has been said that one who, through his own carelessness, fails to know when he must redeem, is not entitled to relief in equity.<sup>2</sup> But it has been said that a suit by a mortgagee to enforce his right to redeem the land in possession of another mortgagee, who has purchased it at a tax sale, is not to be defeated on the ground of laches, where the defendant had been in possession but six and a half years when the suit was begun;<sup>3</sup> and where a sale under a power in a trust deed was of a character wholly unauthorized, and merely amounted to a private sale, though public in form, the doctrine of laches has no application to the right to redeem.<sup>4</sup>

§ 1108. **By statute of limitations.**—Uninterrupted possession by the mortgagee, or those claiming under him, without any account or acknowledgment of the mortgage for more than twenty years, except where the mortgagor, or those in privity to him, is under a disability,<sup>5</sup> bars the equity of redemption.<sup>6</sup> The supreme court of Ohio, in the case of *Clark v. Potter*,<sup>7</sup> say that where the mortgaged premises are an entire tract, as a farm, part of which only is improved, with a tenement thereon, and the possession to the whole is so far adverse as to create a cause of action in favor of the mortgagor, and cause time to commence running against the right to redeem, the temporary interrup-

<sup>1</sup> *Bancroft v. Swain*, 143 Mass 144; s. c. 9 N. E. Rep. 539; 3 N. Eng. Rep. 309.

<sup>2</sup> *Francis v. Parks*, 55 Vt. 80.

<sup>3</sup> *Hall v. Westcott*, 17 R. I. 504; s. c. 23 Atl. Rep. 25; 2 N. Eng. Rep. 887.

<sup>4</sup> *Williamson v. Stone*, 27 Ill. App. 214; *affd.* 128 Ill. 129; s. c. 22 N. E. Rep. 1005.

<sup>5</sup> See *Post*, § 1110.

<sup>6</sup> *Demarest v. Wynkoop*, 3 John. Ch.

(N. Y.) 129; s. c. 8 Am. Dec. 467. See: *Moore v. Cable*, 1 John. Ch. (N. Y.) 385; *Clark v. Potter*, 32 Ohio St. 49; *Aggar v. Rickerell*, 3 Atk. 325; *Anonymous*, 3 Atk. 313; *Barron v. Martin*, 1 Coop. Eq. 189; *Reeks v. Postlewaite*, 1 Coop. Eq. 161; *Belch v. Harvey*, 2 Pr. Wms. 287n; *Bonney v. Ridgard*, 19 Ves. 99; *Hodie v. Haley*, 1 Ves. & B. 536.

<sup>7</sup> 32 Ohio St. 49.

tion of actual residence on the land, caused by the unlawful and violent acts of strangers in tearing down the house and rendering the premises untenable for the time being, will not prevent the statute from continuing to run where there is no adverse entry or offer to redeem, and the mortgagee does not abandon his possession and control, but continues to exercise all acts of ownership and dominion<sup>1</sup> over the premises of which the nature of the land and its condition will admit.

§ 1109. Same—When statute begins to run.—The statute of limitations begins to run from the time when the mortgagee, or those in privity claiming under him, takes actual, open and notorious possession of the premises. Where there is a foreclosure in due and legal form, the statute of limitations will begin to run from the time of confirmation of the sale under the judgment or decree; but where time is given after the sale in which to redeem, the relation of mortgagor and mortgagee will continue until the expiration of such time, and the statute of limitations will not begin to run until after the date fixed on which redemption may be made.<sup>2</sup>

§ 1110. Same—Disability.—In those cases where the defendant is under any of the disabilities recognized by law at the time the statute would otherwise begin to run, the statute of limitations will not run. These disabilities are, among others, absence from the state,<sup>3</sup> coverture,<sup>4</sup>

<sup>1</sup> Knowlton v. Walker, 13 Wis. 275. See: Warder v. Enslin, 73 Cal. 291; Frink v. Le Roy, 49 Cal. 314; Crawford v. Taylor, 42 Iowa 260; Green v. Turner, 38 Iowa 118; Montgomery v. Chadwick, 7 Iowa 113; Bird v. Keller, 77 Me. 270; Anding v. Davis, 38 Miss. 574; s. c. 77 Am. Dec. 658; Kohlheim v. Harrison, 34 Miss. 457; Hubbard v. Sibley, 50 N. Y. 468; Miner v. Beckman, 14 Abb. (N. Y.) Pr. N. S. 1; Bailey v. Carter, 7 Ired. (N. C.) Eq. 282; Waldo v. Rice, 14 Wis. 276; Babcock v. Wyman, 60

U. S. (19 How.) 289; bk. 15 L. ed. 644.

<sup>2</sup> Rockwell v. Servant 63 Ill. 429.

<sup>3</sup> Clinton Co. v. Cox, 37 Iowa 570; Waterson v. Kirkwood, 19 Kan. 9; Phillips v. Sinclair, 20 Me. 269; Whalley v. Eldridge, 24 Minn. 358; Parsons v. Noggle, 23 Minn. 328; Beckford v. Wade, 17 Ves. 87; s. c. 11 Rev. Rep. 20.

<sup>4</sup> Traders Insurance Co. v. Newman, 120 Ind. 554; s. c. 22 N. E. Rep. 428; Barr v. Van Alstine, 120 Ind. 139; s. c. 22 N. E. Rep. 965;



infancy,<sup>1</sup> insanity,<sup>2</sup> public war,<sup>3</sup> and sometimes fraud.<sup>4</sup> A party can only avail himself of those disabilities existing when the right of action first accrued, and for that reason cannot take advantage of successive disabilities which are not regarded in the construction of the statute of limitations.<sup>5</sup> The general rule is that when the statute has begun

*Eager v. Commonwealth*, 4 Mass. 182; *Acker v. Acker*, 81 N. Y. 143; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129; s. c. 8 Am. Dec. 467.

<sup>1</sup> *Hanford v. Finch*, 41 Conn. 483; *Hertle v. McDonald*, 2 Md. Ch. 128; *Anding v. Davis*, 38 Miss. 574; s. c. 77 Am. Dec. 658; *Wells v. Morse*, 11 Vt. 9; *Snavelly v. Pickle*, 29 Gratt. (Va.) 39; *Fitzhugh v. Anderson*, 2 Hen. & M. (Va.) 289. s. c. 3 Am. Dec. 625; *Parsons v. McCracken*, 9 Leigh (Va.) 495; *Belch v. Harvey*, 3 Pr. Wms. 287n; *Proctor v. Cowper*, 2 Vern. 377. See: *Fearn v. Shirley*, 31 Miss. 301; s. c. 66 Am. Dec. 575; *Beacon v. Gray*, 23 Miss. 140.

<sup>2</sup> *Currier v. Gale*, 85 Mass. (3 Allen) 328; *Allis v. Moore*, 84 Mass. (2 Allen) 306.

<sup>3</sup> *Hall v. Dencklay*, 38 Ark. 506; *Reynolds v. Baker*, 3 Coldw. (Tenn.) 221; *Conrad v. Waples*, 96 U. S. 279. 305; bk. 24 L. ed. 721, 728; *Lassere v. Rochereau*, 84 U. S. (17 Wall.) 437; bk. 21 L. ed. 694; *Dean v. Nelson*, 77 U. S. (10 Wall.) 158; bk. 19 L. ed. 926; *Montgomery v. United States*, 28 U. S. (15 Wall.) 395; bk. 21 L. ed. 97. See: *Washington University of Missouri v. Finch*, 85 U. S. (18 Wall.) 106; bk. 21 L. ed. 818; *Ludlow v. Ramsey*, 78 U. S. (11 Wall.) 581; bk. 20 L. ed. 216.

Mr. Justice Swain holds in the case of *Lassere v. Rochereau*, 84 U. S. (17 Wall.) 437; bk. 21 L. ed. 694, that it is contrary to the plainest prin-

ciples on reason and justice, that any one should be condemned as to person or property without an opportunity to be heard. Where defendants were within the Confederate lines at the time of proceedings to foreclose a mortgage, and it was unlawful for them to cross those lines, a notice directed to them and published in a newspaper was a mere idle form, as to them, and the proceedings were wholly void and inoperative.

<sup>4</sup> *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129; s. c. 8 Am. Dec. 467; *Marks v. Pell*, 1 John Ch. (N. Y.) 594. See: *Hunt's Heirs v. Ellison's Heirs*, 32 Ala. 173; *George v. Gardner*, 49 Ga. 441; *Wilson v. Robertson*, 21 N. Y. 587; *Marks v. Pell*, 1 John. Ch. (N. Y.) 594; *Reynolds v. Baker*, 6 Coldw. (Tenn.) 221; *Guinn v. Locke*, 1 Head. (Tenn.) 110; *Kinsman v. Rouse*, L. R. 17 Ch. Div. 104.

The supreme court of Alabama say, in the case of *Hunt's Heirs v. Ellison's Heirs*, *supra*, that an application to the chancery court to set aside a decree and foreclosure on account of fraud and irregularities, must be made within a reasonable time, and that an application after thirteen years had elapsed, and the land had greatly increased in value, had passed into the hands of subsequent purchasers who had erected valuable improvements thereon, was not within a reasonable time.

<sup>5</sup> *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129; s. c. 8 Am. Dec. 467.

to run it will continue to run without being impeded by any subsequent disability.<sup>1</sup> Thus if the owner of the equity of redemption becomes insane or falls under any other of the disabilities before mentioned, with the possible exception of public war, after the statute begins to run, such disability will not prevent a bar.<sup>2</sup> The reason for this is that the rule is intended to save the rights of the party until all the disabilities, existing at the time the right accrues, are removed. Further than this it has never been extended.<sup>3</sup> When the statute of limitations begins to run it continues to run and overrides all disabilities subsequently arising.<sup>4</sup>

§ 1111. By adverse possession.—Adverse possession of the mortgaged premises may bar the equity of redemption.<sup>5</sup> Thus actual possession for the period required by the statute of limitations by the mortgagee, or adverse possession by a stranger to the mortgage, without accounting, or

<sup>1</sup> *Currier v. Gale*, 85 Mass. (3 Allen) 328; *Demarest v. Wynkoop*, 3 John Ch. (N. Y.) 129; s. c. 8 Am. Dec. 467; *Davis v. Indiana*, 94 U. S. 792; bk. 24 L. ed. 320. See: *Keil v. Healey*, 84 Ill. 104; *Stephens v. McCormick*, 5 Bush (Ky.) 181; *Ruff v. Bull*, 7 Harr. & J. (Md.) 14; *Allis v. Moore*, 84 Mass. (2 Allen) 306; *DeMill v. Moffatt*, 49 Mich. 130; *Byrd v. Byrd*, 28 Miss. 144; *Pinckney v. Burrage*, 31 N. J. L. (2 Vr.) 21; *Becker v. Van Valkenburgh*, 29 Barb. (N. Y.) 324; *Peck v. Randall*, 1 John. (N. Y.) 165; *Seawell v. Bunch*, 6 Jones (N. C.) L. 197; *Reimer v. Stuber*, 20 Pa. St. 458; *Dillard v. Philson*, 5 Strob. (S. C.) Eq. 213; *Tracey v. Atherton*, 36 Vt. 503; *Hogan v. Kurtz*, 94 U. S. 773; bk. 24 L. ed. 317; *Mercer v. Selden*, 42 U. S. (1 How.) 37; bk. 11 L. ed. 38; *Walden v. Gratz*, 14 U. S. (1 Wheat.) 292; bk. 4 L. ed. 94; *Lewis v. Barksdale*, 2 Brock. C. C. 436; *Rhodes v. Smethurst*, 4 Mees. & W. 42; s. c. 6

*Id.* 351; *Cotterell v. Dutton*, 4 Taunt. 826.

<sup>2</sup> *Currier v. Gale*, 85 Mass. (3 Allen) 328; *Allis v. Moore*, 84 Mass. (2 Allen) 306.

<sup>3</sup> *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129; s. c. 8 Am. Dec. 467; *McFarland v. Stone*, 17 Vt. 175; s. c. 44 Am. Dec. 328.

<sup>4</sup> *Denn v. Richards*, 15 N. J. L. (3 J. S. Gr.) 347; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129; s. c. 8 Am. Dec. 467; *Harris v. McGovern*, 2 Sawy. C. C. 513; *Denn v. Moore*, 3 Wall. Jr. C. C. 292; *Doe ex. d. Duroure v. Jones*, 4 Dunf. & E. (4 T. R.) 300; 2 Rev. Rep. 390; *Fleming v. Griswold*, 3 Hill 85.

<sup>5</sup> *McNair v. Lot*, 34 Me. 285; s. c. 84 Am. Dec. 78; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 135; s. c. 8 Am. Dec. 467; *Elmendorf v. Taylor*, 23 U. S. (10 Wheat.) 152; bk. 6 L. ed. 289; *Cholmondeley v. Clinton*, 2 Jac. & W. 187.

acknowledgment of any subsisting mortgage, bars the equity of redemption of the mortgagor by operation of the statute of limitations.<sup>1</sup> Thus where a mortgagor allows the mortgagee or those claiming under him to hold possession of the mortgaged premises for twenty years or more without accounting and are without admitting that the possession is that of a mortgaged title only, bars the equity of redemption, and the title of the mortgagee or parties in privy becomes absolute in equity, as in law.<sup>2</sup>

<sup>1</sup> *McNair v. Lot*, 34 Mo. 285; s. c. 84 Am. Dec. 78. See: *Parker v. Prewitt*, 64 Ala. 555; *Goodman v. Winter*, 64 Ala. 431; *Barksdale v. Garrett*, 64 Ala. 281; *McCoy v. Morrow*, 18 Ill. 519; s. c. 68 Am. Dec. 578; *Stump v. Henry*, 6 Md. 201; s. c. 61 Am. Dec. 300; *Ford v. Wilson*, 35 Miss. 490; s. c. 72 Am. Dec. 137; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90, 96; *Martin v. Jackson*, 27 Pa. St. 504; s. c. 67 Am. Dec. 489.

Possession by the mortgagee for the time designated in the statute of limitations of a particular state, and a refusal on his part to recognize the mortgage or any equitable claim of the mortgagor, where the mortgagor is under no disability, will have the effect to bar the equity of redemption of the mortgagor. *Davidson v. Lawrence*, 49 Ga. 340; *Locke v. Caldwell*, 91 Ill. 419; *Howland v. Shurtleff*, 43 Mass. (2 Met.) 26; *Cape Girardeau v. Harbison*, 58 Mo. 90, 96; *McNair v. Lot*, 34 Mo. 285; s. c. 84 Am. Dec. 78; *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 60; *Calkins v. Calkins*, 30 Barb. (N. Y.) 307; *Demarest v. Wyunkoop*, 3 John. Ch. (N. Y.) 129, 135; s. c. 8 Am. Dec. 467; *Moore v. Cable*, 1 John. Ch. (N. Y.) 385; *Slee v. Manhattan Co.*, 1 Paige Ch. (N. Y.) 48;

*Ross v. Norval*, 1 Wash. (Va.) 17; *Elmendorf v. Taylor*, 23 U. S. (10 Wheat.) 152, 170; bk. 6 L. ed. 295; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142; *Dexter v. Arnold*, 1 Sumn. C. C. 109; *Blake v. Foster*, 2 Ball & B. 402, 457; *Barron v. Martin*, 19 Ves. 327; s. c. 3 Bro. Ch. 243.

The question of adverse possession depends on the intention of the possessor and the knowledge or means thereof on the part of the owner of the equity of redemption, and is always a question of fact to be determined by the jury. *Ford v. Wilson*, 35 Miss. 490; s. c. 72 Am. Dec. 137.

<sup>2</sup> *Dawson v. Hoyle*, 58 Ala. 44; *Clark v. Cluff*, 65 N. H. 43; *Clark v. Potter*, 32 Ohio St. 42.

If a mortgagee, with the knowledge and acquiescence of the mortgagor, takes actual, open, and notorious possession of the mortgaged premises, and holds and controls the same, adversely to the rights of the mortgagor to redeem, for twenty-one years, under color of title derived from the mortgage, and from a decree of foreclosure and sale of the same to him, the equity of redemption is barred, although the decree foreclosing the mortgage was null and void. *Clark v. Potter*, 32 Ohio St. 49.

§ 1112. By purchase by mortgagee.—The supreme court of Arkansas, in the case of *Moore v. Anders*,<sup>1</sup> say that the mortgagor's equity of redemption is not barred by a purchase of the mortgaged premises made by a holder of the mortgage debt; but where the mortgagee or the purchaser of the mortgage debt, on default takes possession of the mortgaged premises and holds the same for the space of twenty years without paying interest, or in any other way accounting for said possession, and there is no circumstance appearing to justify the neglect, the mortgagor's right of redemption will be barred.<sup>2</sup>

§ 1113. Tender does not revive.—In those cases where the right of the owner of the equity of redemption to redeem has been barred by the running of the statute of limitations, such right will not be revived by a subsequent tender of the amount due on the mortgage, and a demand of the possession of the premises.<sup>3</sup>

§ 1114. Waiver.—The extinction by the running of the statute of limitations of the right of the mortgagor, or those claiming under him, to redeem, may be waived by an act of the mortgagee, or the owner of the mortgage, which indicates a disclaimer of the foreclosure, and presumptively leaves the mortgage subject to redemption in equity; such as bringing suit and obtaining a judgment on the original debt,<sup>4</sup> or doing any other act which shows that the party treats the debt as still due, and the account as still open ;\*

Where the possession of a mortgagee and one to whom he conveyed absolutely has continued for more than twenty years, without interruption or claim from the mortgagor or his heirs, a sale of the property and conveyance under the mortgage, or almost anything else necessary to give repose to the title of the purchaser, will be presumed. *Dawson v. Hoyle*, 58 Ala. 44.

<sup>1</sup> 14 Ark. 628; s.c. 60 Am. Dec. 551.

<sup>2</sup> *Brobst v. Brock*, 77 U. S. (10 Wall.) 519; *sub nom* *Doc ex. d. Brobst v. Roe*, 19 L. ed. 1002; *Slicer*

*v. Pittsburgh*, 57 U. S. (16 How.) 571; bk. 14 L. ed. 1063; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 439; bk. 6 L. ed. 142. See: *Ante*, § 1111.

<sup>3</sup> *Cunningham v. Hawkins*, 24 Cal. 403; s. c. 85 Am. Dec. 73; *Miner v. Beekman*, 11 Abb. (N. Y.) Pr. N. S. 147; 42 How. (N. Y.) Pr. 33.

<sup>4</sup> *Hazard v. Robinson*, 15 R. I. 226; s. c. 2 Atl. Rep. 433; 1 N. Eng. Rep. 882.

<sup>5</sup> *Bissell v. Boseman*, 2 Dev. (N. C.) 154, 166. See: *McEwen v. Welleys*, 1 Root (Conn.) 202; *Strong v. Strong*, 2 Aik. (Vt.) 373

and the extinguishment of the mortgagor's equity effected by judicial action, is still subject to be waived by an admission on the part of the mortgagee, or the party holding the equity of redemption.<sup>1</sup>

§ 1115. Same—By acknowledgment.—Any acknowledgment on the part of the mortgagee, or those in privity with him, of the right of the mortgagor to redeem, will prevent the running of the statute of limitations and the bar of redemption,<sup>2</sup> such as an admission of the existence of the debt, whether oral or in writing;<sup>3</sup> an assignment of the mortgage as security for a debt owing from a mortgagee in possession;<sup>4</sup> bringing an action to foreclose the mortgage,<sup>5</sup>

<sup>1</sup> Chapin v. Wright, 41 N. J. Eq. (14 Stew.) 438; 5 Atl. Rep. 574; 4 Cent. Rep. 59.

<sup>2</sup> Chapin v. Wright, 41 N. J. Eq. (14 Stew.) 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 60; Robinson v. Fife, 3 Ohio St. 562; Waldo v. Rice, 14 Wis. 290; Slicer v. Bank of Pittsburg, 57 U. S. (16 How.) 572, 579; bk. 14 L. ed. 1063, 1066; Dexter v. Arnold, 1 Sumn. C. C. 109.

If a mortgagee in possession shall, after the equity of the mortgagor has become barred by lapse of time, admit, either by word or act, that his mortgage is still a subsisting lien, the bar previously existing will be considered to have been waived, and the equity of the mortgagor revived. Chapin v. Wright, 41 N. J. Eq. (14 Stew.) 438; s. c. 5 Atl. Rep. 574; 4 Cent. Rep. 60.

<sup>3</sup> Wells v. Harter, 56 Cal. 342; Kerndt v. Porterfield, 56 Iowa 412; s. c. 9 N. W. Rep. 322; Schmucker v. Sibert, 18 Kan. 104; Southard v. Pope, 9 B. Mon. (Ky.) 261; Hall v. Felton, 105 Mass. 516; Lyon v. Mc-

Donald, 51 Mich. 455; s. c. 16 N. W. Rep. 800; Murphy v. Coates, 33 N. J. Eq. (6 Stew.) 424; Mosely v. Crocket, 9 Rich. (S. C.) Eq. 339; Haywood v. Ensley, 8 Humph. (Tenn.) 460; Snively v. Pickle, 29 Gratt. (Va.) 27.

Parol admissions by mortgagee effect his estoppel to deny mortgagor's right to redeem. Hough v. Bailey, 32 Conn. 288; Fenwick v. Macey, 1 Dana (Ky.) 276; Marks v. Pell, 1 John. Ch. (N. Y.) 594; Shepperd v. Murdock, 3 Murph. (N. C.) 218; Walthol v. Johnson, 2 Call (Va.) 275; Dexter v. Arnold, 3 Sumn. C. C. 160; Perry v. Marston, 2 Bro. C. C. 397; Reeks v. Posthethwaite, 1 Coop. Eq. 161; Whiting v. White, 1 Coop. Eq. 1; Rayner v. Oastler, 6 Madd. 274.

<sup>4</sup> Borst v. Boyd, 3 Sandf. Ch. (N. Y.) 501.

<sup>5</sup> Calkins v. Calkins, 3 Barb. (N. Y.) 305; Robinson v. Fife, 3 Ohio St. 551; Conway v. Shrimpton, 5 Bro. P. C. 187. See: Clark v. Potter, 32 Ohio St. 49, 60; Fox v. Reeder, 28 Ohio St. 181, 189.



or filing an answer in equity;<sup>1</sup> devise by will;<sup>2</sup> letters written containing admissions of the existence of the mortgage and of the rights of the mortgagor;<sup>3</sup> recitals in a deed;<sup>4</sup> in a mortgage,<sup>5</sup> or rendering an account of the amount due on the mortgage debt.<sup>6</sup>

<sup>1</sup> See: *Stump v. Henry*, 6 Md. 201; s. c. 61 Am. Dec. 300; *Durken v. Cleveland*, 4 Ala. 227; *Rankin v. Maxwell*, 2 A. K. Marsh. (Ky.) 491; s. c. 12 Am. Dec. 431; *Belden v. Davies*, 2 Hall (N. Y.) 444; *Erskine v. North*, 14 Gratt. (Va.) 60; *Dexter v. Arnold*, 1 Sumn. C. C. 109; s. c. 3 Sumn. C. C. 152; *Goode v. Job*, 1 El. & El. 6; s. c. 102 Eng. C. L. 4; *Hodle v. Healey*, 6 Madd. 181.

<sup>2</sup> *Kohlheim v. Harrison*, 34 Miss. 457; *Ord v. Smith*, 2 Eq. Cas. Abbr. 600; *Lake v. Thomas*, 3 Ves. 17.

<sup>3</sup> *Stanfield v. Hobson*, 10 Beav.

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<sup>4</sup> *Biddell v. Brizzolara*, 56 Cal. 374; s. c. 64 Cal. 354; *Cape Girardeau Co. v. Harbeson*, 58 Mo. 90; *Jayne v. Hughes*, 10 Exch. 430; *Lucas v. Denison*, 7 Jur. 1122; *Carew v. Johnson*, 2 Sch. & L. 280; *Hansard v. Hardy*, 18 Ves. 455.

<sup>5</sup> *Palmer v. Butler*, 36 Iowa 576.

<sup>6</sup> *Anonymous*, 2 Atk. 333; *Barron v. Martin*, 19 Ves. 327; *Edsdell v. Buchanan*, 2 Ves. Jr. 84.

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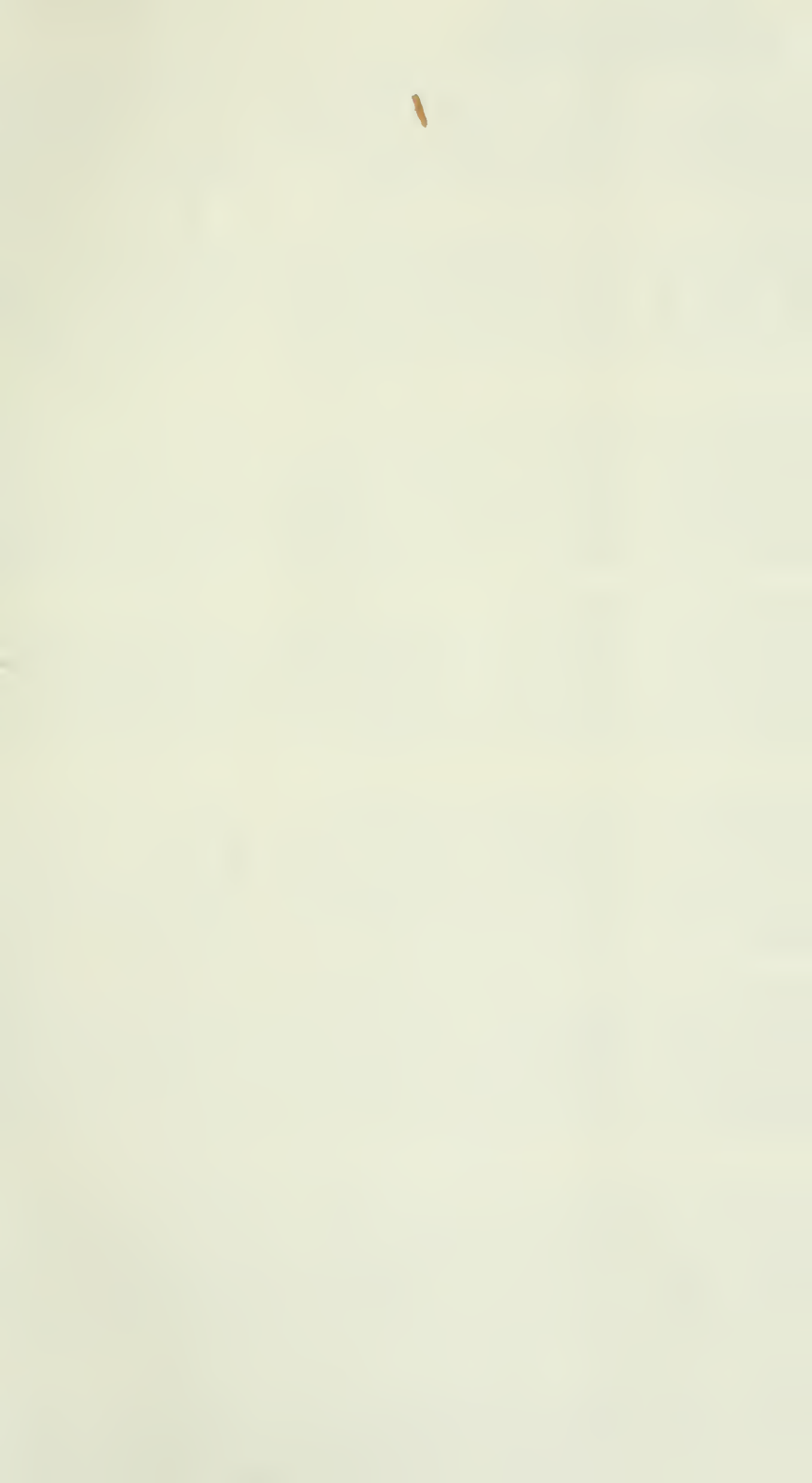




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